

## Articles

### Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City

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*At least since the early twentieth century, informal specialized prostitution courts have tried to double as social welfare agencies. For this reason, prostitution courts illustrate in particularly explicit ways how public welfare administration and criminal court administration share similar ideas and practices and how these ideas and practices reinvent themselves over time. This Article traces three moments of prostitution court reform in New York City: the New York Women's Court that opened in Manhattan in 1910, the Midtown Community Court that opened in Manhattan in 1993, and four new prostitution courts that opened in New York City in 2013. It examines how court reformers in each moment used informal procedure to promote social welfare, social control, and individual responsibility, and it ties each approach to changing conceptions of the American welfare state. Ultimately, the Article argues that the genealogy of prostitution courts illuminates for the present how court reformers are using the language of trauma to negotiate the welfare logics of today.*

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## Introduction

Over the last three decades, government services for the poor and marginalized have dwindled at the same time as the population of people in prison has dramatically increased. But we have not simply witnessed the retrenchment of particular welfare state programs alongside the

intensification of carceral ones.<sup>1</sup> Today, the criminal justice system provides its own welfarist institutions. In particular, informal “problem-solving” courts administer social services to drug addicts, homeless people, people with mental illness, prostitution defendants, juveniles, veterans, and other vulnerable populations in an effort to protect them from exploitation and abuse, as well as to discourage them from antisocial and criminal behavior. Michael Dorf has thus remarked that “it does not take a great leap of the imagination to envision a not-so-distant future in which much of what front-line courts do is monitor the delivery of services.”<sup>2</sup>

This Article presents a genealogy of prostitution courts in New York City in order to argue that informal criminal courts do not simply monitor or connect defendants to social services; rather they reflect and reconstitute state welfare programs and state social controls under different temporal economic and political conditions. Indeed, in the United States, criminal courts doubling as social agencies do not only portend the future, they also invoke the past. In the early twentieth century, before the rise of a modern national administrative welfare state, Progressive-era “socialized” courts explicitly functioned as welfarist institutions. These courts articulated particular conceptions of the deserving poor, justifications for material and psychological interventions, and practices of rehabilitation and moral reform.

During the Progressive era, prostitution represented a paradigmatic category of crime newly understood as a matter of social responsibility and thus of criminal court reform. Progressive-era reformers, broadly involved in efforts “to correct the imbalance of economic power associated with the new industrial order,”<sup>3</sup> argued that concentrated and exploitative markets for sex combined with exploitative and immoral labor markets to victimize women. In 1910, amidst a widespread effort to “socialize” urban municipal courts, New York court reformers launched the country’s first Women’s Court in Manhattan, which promised to provide prostitution defendants with

1. Several scholars read welfare retrenchment and the expansion of criminal law together (to be sure, in complex, incomplete, and disaggregated ways). See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009); Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 88–89 (2015).

2. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 944 (2003). Dorf has also described problem-solving courts as “more akin to decentralized administrative agencies than to conventional adjudicators.” Michael C. Dorf, *An Institutional Approach to Legal Indeterminacy* 1 (Columbia Law Sch. Pub. Law & Legal Theory Paper Grp., Paper No. 02-44, 2002), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=326780](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=326780) [<https://perma.cc/SS8P-FS6N>].

3. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 106 (3d ed. 2008).

moral and social pedagogy and a measure of material aid. The Women's Court largely failed to enact this rehabilitative vision. But the arguments for state paternalism that the court embodied both reflected and prefigured broader demands for state intervention to mitigate the insecurity and instability produced by unregulated markets—claims that, in the mid-1930s, shaped the rise of a modern administrative welfare state, including, for example, protections for different groups of labor and the creation of a minimum means-tested (if also stigmatized) public assistance program meant to achieve a measure of poverty alleviation.

It would not be until the 1990s that the United States would witness another wave of criminal courts designed explicitly as social governance agencies that rivaled Progressive-era courts in scope and ambition. Analysts and advocates widely (indeed hyperbolically) described these new courts as state welfare programs. Timothy Casey, for example, observed that “[t]he failure of various agencies has led to the dumping of *all social problems* into the laps of the courts.”<sup>4</sup> Or, as Judge Peggy Hora put it: “Should we be the ones to be providing these social services and interventions? I don’t know. But I will tell you one thing. Nobody else is doing it, and if not us, who? And if not now, when?”<sup>5</sup>

Of course, when contemporary socialized—this time called “problem-solving”—courts emerged at the end of the twentieth century rather than at the beginning, they did so under very different political, economic, and social conditions. As such, they reflected and reinforced an ethos of individual, rather than social, responsibility that was transforming state welfare at the time into more market-inflected and minimalist governance programs. From this perspective, prostitution defendants were treated as an unexceptional class of low-level offenders suffering from mental illness and drug addiction. And problem-solving courts offered them social services alongside new social controls—typically, programs designed to teach them how to make more informed and responsible choices to “change their lifestyles.”<sup>6</sup>

This responsabilization model has remained the dominant welfarist frame for many, if not all, American problem-solving courts. That is, until very recently. In 2013, the state of New York created new problem-solving

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4. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1516 (2004) (emphasis added); see also Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL’Y 125, 128 (2001) (pointing to “[b]reakdowns among social and community institutions” as creating a void for problem-solving courts to fill).

5. Judge Peggy Hora, Address at the Fordham Urban Law Journal Eleventh Annual Symposium on Contemporary Urban Challenges (Mar. 1, 2002), in 29 FORDHAM URB. L.J. 2011, 2030 (2002).

6. Michele Sviridoff et al., *Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court* 1.11 (Sept. 2002) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/196397.pdf> [<https://perma.cc/GF4E-ZDHW>].

prostitution courts, which it called Human Trafficking Intervention Courts (HTICs).<sup>7</sup> As their name suggests, the courts' creators did not envisage prostitution defendants primarily as irresponsible offenders who needed to be taught better ways of living. Instead, they conceived of them as victims of human trafficking. This is true of not only those who satisfy the statutory definition of being sex-trafficked, but of "ordinary" prostitution defendants as well.

And here is the crucial innovation: in order to create a new alternative court based on victimization rather than responsibilization, feminist court reformers redescribed prostitution as a product not of market exploitation but of *family trauma*. It is because, they argued, prostitution defendants suffer from childhood sexual assault and violence at the hands of intimate-partner pimps that they need a court to provide trauma-informed care. As such, HTICs offer social services without necessarily demanding that defendants bootstrap themselves as self-responsible actors or that service providers measure success exclusively as cost savings to the criminal justice system—in part challenging, I will argue, in part reinforcing, dominant welfare logics today.

This Article offers a genealogy of prostitution courts in New York City in order, then, to illustrate how criminal court reform and public welfare administration share similar modes and practices of governance and how these modes and practices reinvent themselves over time.<sup>8</sup> It sketches three different moments of prostitution court reform in New York City: the 1910s and 1920s, the 1990s, and today. What unifies these three periods are the similar ways in which court reformers articulated especially intensive commitments to informal criminal courts as important tools of social problem-solving even as these courts of course respond to very different economic and political conditions.

This Article thus does not provide an overarching social history. Instead, by closely examining New York City prostitution courts in three periods, it more modestly traces three interrelated ideas. First, the Article traces how court reformers use informal procedure as a means of transforming the self-understanding and social behavior of prostitution defendants: in the Progressive era, via programs for moral and behavioral reform; in the 1990s, via programs to teach individual responsibility; and today via trauma-based social controls—which involve a complex mix of paternalism and self-determination. Second, the Article traces how underlying these uses of informal procedure are changing representations of prostitution defendants themselves: from potentially (but not always) market

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7. Press Release, Hon. A. Gail Prudenti, Chief Administrative Judge, N.Y. State Unified Court System, NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative (Sept. 25, 2013), [https://www.nycourts.gov/press/PR13\\_11.pdf](https://www.nycourts.gov/press/PR13_11.pdf) [<https://perma.cc/FTL2-4C4P>].

8. WACQUANT, *supra* note 1, at 14.

victims to petty market participants to dedifferentiated trauma victims. And, third, the Article traces how different representations of prostitution are intertwined with changing ideas about social responsibility and welfare state programs, including the role of criminal courts within them.

To that end, the Article begins in Part I by exploring how procedure in the Women's Court in Manhattan was informed by a view of prostitution as a symbol and product of capitalism's excesses—a view of prostitution that was shared by those both on the right and the left of the political spectrum. This understanding of prostitution as a product of capitalist excess, in turn, prefigured the rise of national programs of public assistance based on arguments about market instability, exploitation, and dependency. In Part II, the Article examines the rise of contemporary problem-solving courts in the 1990s and describes the logic of their operation. These courts, the Article argues, deployed models of individual responsibility that were reshaping public welfare programs more broadly at the time. The Article then proceeds to illustrate how problem-solving courts for prostitution defendants in New York City have been transformed in the present by new, popular conceptions of prostitution as an effect of trauma.

The Article concludes with a question: are the HTICs part of a larger “trauma-informed” reconfiguration of social welfare both within criminal adjudication and beyond? The answer to this question—which we can know only from practice unfolding on the ground—matters. The more criminal courts administer social services today, the more these services are based not on income inequality but rather on entering the criminal justice system as a particular kind of “deserving” defendant. When feminist court reformers described prostitution defendants as victims of trauma—rather than, say as in the early twentieth century, victims of precarious labor-market conditions—they leveled a critique of family violence that simply had little to say about capitalism, political economy, or social-egalitarian arguments for redistribution. This critique has been remarkably effective in garnering state resources and motivating court reform. Its success has helped to transform select criminal courts into social service providers on the basis of psychological disability (post-traumatic stress disorder), not poverty.<sup>9</sup> But

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9. To be sure, numerous scholars have observed how dominant contemporary strands of feminism use *injury* to make claims upon the state (and elsewhere). *E.g.*, WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995); *see also* JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 6, 9 (2006). Scholars have also observed how these feminist arguments have disengaged from broader political-economic critiques of state-organized capitalism as well as from broader defenses of social-democratic welfare state polices and economic justice. *See generally* NANCY FRASER, *FORTUNES OF FEMINISM* (2013). I build here on these insights to illustrate how in this particular court reform context, some feminists have used trauma to motivate the distribution of public and private resources based on a sensibility of victimization, *see also* Amy J. Cohen & Aya Gruber, *Governance Feminism in New York's*

precisely because trauma-related disorders follow from a social etiology, a minority of actors within the HTICs are simultaneously attempting to use arguments about trauma to create more complex, even solidaristic, relations of dependency and welfare, including by indexing failed social and economic systems. The HTICs, the Article thus ventures, embody renewed demands for social responsibility and more expansive forms of state protection, but ones that are mediated by the politically capacious—but also, we shall see, politically constrained—language of trauma.

## I. Victims of the Market: The 1910s and 1920s

### A. *A Note on Methods*

I begin this genealogy with early twentieth-century urban courts because they offer a baseline to consider how criminal court reformers understand the virtues of informal court procedure and the dangers of commercial sex, and how these differences mark when and why populations are understood as deserving of state welfare under changing social and political conditions. More specifically, I suggest that Progressive-era socialized courts offer a baseline to consider how criminal courts use informal procedure to combine state welfare with social control and individual responsibility in order to manage and care for the poor.

Of course, these terms—social welfare, social control, and individual responsibility—are all ideal types that easily bleed together to animate alternative forms of criminal adjudication: social welfare may be (indeed, it nearly always is) conditioned on programs of social control; social control may encourage individual responsibility. But at a high enough level of generality, these ideal types hold sufficiently distinct descriptive purchase—worth a quick sketch—because, I will argue, what a genealogy of New York City prostitution courts illustrates is how these constructs do not stay stable over time.

By *social welfare*, I mean how courts in collaboration with state agencies and private institutions offer material services that offenders themselves desire, such as assistance in finding shelter, employment, or achieving immigration status.

By *social control*, I mean how courts, also in collaboration with other state and nonstate actors, administer moral and social enculturation and pedagogy including forms of supervision, examination, therapy, and training. These pedagogical forms are designed to reorient and alter how offenders behave and how they understand themselves and their social relations and obligations. I should add: for Progressives there was nothing particularly

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*Human Trafficking Intervention Courts*, in GOVERNANCE FEMINISM: A HANDBOOK (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds., forthcoming), yet others have used trauma to articulate more systemic-reformist positions.

pernicious about what was then a commonly used term. Social control described a purposeful effort by planners to use state and private power to adjust social relations among individuals, the market, and their communities in order to advance a cohesive social order, including by helping the poor and needy function within it.<sup>10</sup>

Finally, by *individual responsibility*, I mean the extent to which courts treat crime, poverty, and rehabilitation as the subject of an individual's autonomous control—that is, a choice that is *not* overwhelmed by extrinsic social, economic, and biological forces and conditions.

Ultimately, I argue that we gain insights into the conditions of the present by tracing how these elements of court reform shift and combine in different ways over time. But, to be clear, my claim is not simply that we have witnessed a shift from the “deserving poor” to the “deserving trauma victim” (although there has been that). Nor do I want too easily to suggest that things could be otherwise—for example, that court reformers today could revive a Progressive-era critique of unregulated capitalism (with all of its complexities and contradictions) as a primary justification motivating prostitution court reform. Rather, I employ a genealogical approach in order to illustrate some of the temporal constraints that inform how criminal courts act as social welfare agencies and, more specifically, how dominant state welfare narratives shape and are produced and sometimes challenged in the rhetoric and practice of criminal court reform.<sup>11</sup> Framed in this way, it becomes clear how contemporary court reformers are using the language of trauma as a tool to negotiate the welfare logics of today.

My argument about the present builds on a range of primary research, including court observations and interviews with judges, prosecutors, defense attorneys, social workers, and court reformers, several of which were jointly undertaken with Aya Gruber and Kate Mogulescu (all joint interviews are indicated in the footnotes). To that end, I draw in this Article on some of our forthcoming work that describes and critically analyzes the HTICs.<sup>12</sup>

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10. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 72 (6th ed. 1999); MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 59, 83 (2003); *see generally* EDWARD ALSWORTH ROSS, SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER (1908).

11. I build here on Ben Golder's exposition of the genealogical method. *See generally* Ben Golder, *Contemporary Legal Genealogies*, in CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Chris Tomlins eds., forthcoming 2017).

12. Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. (forthcoming 2017) (on file with author). We offer an extensive examination of practice in four NYC HTICs, and we argue that because of their welfarist bent, the HTICs may provide new justifications for arrest and incarceration, limit alternative and redistributivist forms of social assistance, and reinforce stigmatizing ideologies about selling sex.



Here I analyze the HTICs through a genealogical lens and one focused on trauma.

### B. *Prostitution and the Rise of Socialized Courts*

That prostitution became the subject of court reform in the first decades of the twentieth century is unsurprising. At the turn of the twentieth century, new “socialized” courts were among the primary local-governance institutions configured to respond to the social problems spurred by industrialization, urbanization, and immigration, particularly for matters involving juveniles, (poor and immigrant) families, and sex (fornication, adultery, prostitution).<sup>13</sup> In other words, these courts targeted ordinary problems—small claims, domestic relations, petty crime, sexual immorality—that disrupted public order and private life: “petty causes, that [are] . . . the everyday rights and wrongs of the great majority of an urban community.”<sup>14</sup>

In contrast to eighteenth- and nineteenth-century police courts, socialized courts were thus not understood as dispute-resolution institutions whose primary responsibility was to keep the peace and adjudicate conflict: that is, no longer as “passive arbiter[s]” but as institutions with “a profound social duty” to “treat[]” social ills.<sup>15</sup> Indeed, early twentieth-century jurists self-consciously rejected the formalist preferences of their nineteenth-century predecessors who, as Amalia Kessler has shown, embraced adversarial procedure precisely to encourage individualistic, egalitarian relationships and, in turn, to discourage values such as paternalism, dependency, and state care.<sup>16</sup> Early twentieth-century jurists—most prominently, Roscoe Pound—reasoned that formal procedures reflected and reinforced outmoded cultural preferences against government intervention at a time when informal procedure was needed instead to “secure social interests” in modern, overcrowded, and heterogeneous cities.<sup>17</sup>

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13. See generally JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983); CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); WILLRICH, *supra* note 10.

14. CHARLES W. ELIOT, LOUIS D. BRANDEIS, MOORFIELD STOREY, ADOLPH J. RODENBECK & ROSCOE POUND, *PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE* 29 (1914).

15. *MUN. COURT OF CHI., SEVENTH ANNUAL REPORT OF THE MUNICIPAL COURT OF CHICAGO* 87 (1913).

16. See AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877*, at 337 (2017) (tracing the “legacy of the nineteenth-century rise of adversarialism”); Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 *THEORETICAL INQUIRIES L.* 423, 476–77 (2009).

17. See Roscoe Pound, *The Administration of Justice in the Modern City*, 26 *HARV. L. REV.* 302, 305–06, 315, 319, 321, 323–24 (1913).

Socialized courts were thus conceived as new kinds of informal social welfare institutions where judges could apply “the scientific principles developed in Medicine, Psychology, and Sociology” to reform the behaviors of individuals and groups,<sup>18</sup> and bring “the good intentions and organized efforts of private citizens . . . to bear upon social problems.”<sup>19</sup> To that end, these courts embraced an increasingly socialized conception of conflict, poverty, and crime that linked the problems of individual defendants to broader social questions such as industrial conditions, minimum wage, sanitation, recreation, family life, overcrowded housing, and mental incapacity.<sup>20</sup> New juvenile, family, and morals/women’s courts housed social workers, doctors, psychiatrists, and volunteers from (often sectarian) philanthropic institutions ready to dispense social services alongside medical and psychological testing.<sup>21</sup> And these courts created new forms of supervision, including parole, probation, and indeterminate commitments to state institutions replete with moral and industrial training.<sup>22</sup>

When it came to prostitution, Progressive-era court reformers described female sellers of sex as paradigmatic victims of social and economic forces beyond their control and thus deserving of “expert and specialized treatment” rather than punishment.<sup>23</sup> Between roughly 1910 and 1920, nearly all major urban jurisdictions in the United States created women’s courts to proffer “care and treatment”<sup>24</sup> to the mostly lower class women arrested on prostitution-related (and a few other) charges.<sup>25</sup> Sympathetic magistrates

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18. Louise Stevens Bryant, *A Department of Diagnosis and Treatment for a Municipal Court*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 198, 198 (1918).

19. RAYMOND MOLEY, *TRIBUNES OF THE PEOPLE: THE PAST AND FUTURE OF THE NEW YORK MAGISTRATES’ COURTS* 4 (1932).

20. See, e.g., WILLRICH, *supra* note 10, at xxi.

21. See, e.g., *id.* at xxvii, xxix; Amy J. Cohen, *The Market, the Family, and ADR*, 2011 J. DISP. RESOL., at 91, 100–03.

22. See generally REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* (1919); GEORGE E. WORTHINGTON & RUTH TOPPING, *SPECIALIZED COURTS DEALING WITH SEX DELINQUENCY: A STUDY OF PROCEDURE IN CHICAGO, BOSTON, PHILADELPHIA AND NEW YORK* (1925); Mary E. Paddon, *The Inferior Criminal Courts of New York City*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 8 (1920); Edward F. Waite, *Courts of Domestic Relations*, 5 MINN. L. REV. 161 (1921); Charles Zunser, *The Domestic Relations Courts*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1926, at 114. See also JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990*, at 33–38 (1993).

23. W. BRUCE COBB, *INFERIOR CRIMINAL COURTS ACT OF THE CITY OF NEW YORK*, ANNOTATED cmt. at 112 (1925).

24. THE COMM. OF FOURTEEN, *REPORT OF THE COMMITTEE OF FOURTEEN IN NEW YORK CITY* 11 (1912).

25. Freda F. Solomon, *Progressive Era Justice: The New York City Women’s Court*, Paper for the Seventh Berkshire Conference on the History of Women (June 19–21, 1987) (unpublished manuscript).

were supposed to connect defendants with charitable organizations and various kinds of state services. But, as we shall see, these courts mixed forms of social welfare with social control and punishment in rather seamless ways. For example, upon arrest, a young woman might find herself attached to a probation officer tasked with helping her find a job or shelter at a philanthropic home; she could also be subject to mandatory forms of psychological and medical testing, including compulsory in-patient venereal disease treatment; and she could be credibly warned that upon another arrest she would face a punitive workhouse sentence.

The New York Women's Court in Manhattan was the first such American experiment in the social governance of prostitution through a criminal court—as one reformer put it, “[t]he enlightened, philanthropic and progressive social element of the community rebelled against such an intolerable condition” where traditional courts “could in no-wise furnish help to the unfortunate women.”<sup>26</sup> I thus begin in subpart C by describing how a particular group of Progressive-era reformers socialized the problem of prostitution. I then turn in the following subparts to the New York Women's Court that followed.

### C. *Prostitution and the Problems of the Market*

There is an enormous literature on prostitution in the Progressive era.<sup>27</sup> This was a moment when reformers of many ideological stripes supported efforts to suppress prostitution through programs of legal, judicial, and penal reform.<sup>28</sup> Feminists, who understood prostitution as an expression of patriarchy and the political and economic limitations confronting women, lobbied for a single standard of sexual morality,<sup>29</sup> which many, in turn, tied

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26. Anna Moscovitz, *The Night Court for Women In New York City*, 5 WOMEN LAW. J. 9, 9 (1915). She proceeded to criticize the court for the application of legal procedure more than social treatment. *Id.*

27. See, e.g., PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM 63 (1999). Not to mention, there is also an enormous literature—rife with historical debates—on the Progressive Era itself, roughly 1890–1920. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 239–41 (1990).

28. Previously, prostitution, while a crime in most states, was often tolerated by city officials and police. Many American cities hosted segregated districts where brothels and prostitutes submitted to informal rules that, for example, required registration, medical examinations, and various restrictions on how to conduct the trade. However, “[b]etween 1893 and 1917 seventy-eight places officially endorsed [a] policy of repression . . . closing open vice resorts.” HOWARD B. WOOLSTON, 1 PROSTITUTION IN THE UNITED STATES: PRIOR TO THE ENTRANCE OF THE UNITED STATES INTO THE WORLD WAR 103–08, 113, 120 (1921); see also LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 224, 227 (1993); Neil Larry Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870–1910*, 19 J. SOC. HIST. 665, 665 (1986).

29. This was a direct assault on eighteenth- and nineteenth-century understandings of prostitution as largely a personal matter, even as a “necessary evil” that provided an outlet for male

to the women's suffrage movement: an idea aptly captured in the slogan "[v]otes for women and chastity for men."<sup>30</sup> Many feminists joined a loose coalition of "social purity" and then later "social hygiene" reformers who also attacked prostitution for its corrosive effects on individual health and personal morality as well as the moral health of the nation.<sup>31</sup> This coalition included, for example, purity feminists such as Women's Christian Temperance Union members as well as socially conservative reformers concerned with preserving the patriarchal family.<sup>32</sup> A powerful strand of social purity reformers, often including business and civic leaders as well as clergy members and physicians, organized themselves into municipal "vice commissions" to investigate and publicize the problem of prostitution.<sup>33</sup> By 1917, vice commissions had published reports in forty-four American cities—all of which called for women's courts.<sup>34</sup>

Common to all these reformist factions was the idea that prostitution symbolized new and exceedingly capacious forms of industrial capitalism. As historian Ruth Rosen elaborates, in the early twentieth century, prostitution became an increasingly organized and rationalized business that reflected and reinforced larger problems of materialism, consumerism, and commodification that new forms of industrialization and urbanization had introduced into American life.<sup>35</sup> To be sure, this argument assumed more leftist and more centrist articulations. Left feminists such as Emma Goldman indicted prostitution as an effect of capitalism writ large: it was "[e]xploitation, of course; the merciless Moloch of capitalism that fattens on underpaid labor."<sup>36</sup> Radical socialist and anarchist feminists argued that

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sexuality and preserved the Victorian character of the American home. RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918*, at 5–6 (1982).

30. Mariana Valverde, *Social Purity*, in *INTERNATIONAL ENCYCLOPEDIA OF HUMAN SEXUALITY* 1332 (2015). On the many strands of feminist reformers, see ROSEN, *supra* note 29, at 51–68 (Chapter 4: The Lady and the Prostitute).

31. Valverde, *supra* note 30, at 1 ("Social purity reformers believed that consumer capitalism's temptations posed new and grave threats not only to individual virtue and health, but also to the health and moral fibre of the nation.").

32. *Id.*

33. Vice committees hired undercover investigators to collect data and compile reports on the state of the underground economy, recount their discoveries to police and prosecutors, and even confront suspects themselves. See, e.g., ROSEN, *supra* note 29, at 14–15; TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790–1920*, at 268–69 (1992); WOOLSTON, *supra* note 28 at 263–64.

34. Solomon, *supra* note 25.

35. She argues that not only the cultural meaning, but also the economic form, of prostitution had changed. What was once a small-scale economic exchange managed mostly by sellers of sex themselves had become a larger scale, rationalized business. ROSEN, *supra* note 29, at 69–70.

36. EMMA GOLDMAN, *THE TRAFFIC IN WOMEN AND OTHER ESSAYS ON FEMINISM* 20 (1970).

wage slavery and sexual slavery, like capitalism and patriarchy, were two sides of the same coin.<sup>37</sup>

By contrast, for many middle-class social purity reformers, commercial sex reflected instead the excesses of consumer capitalism: the invasion of the market too far into the home, or as one vice committee put it, the “commercialization of almost every phase of human interest,” undermining the patriarchal and social structures that had previously protected women and the family.<sup>38</sup> From this perspective, laissez-faire capitalism, the depredations of new unchecked forms of consuming pleasure and leisure, and poor working conditions for women who increasingly labored in industrial America combined to undermine a moral capitalist and social order. Here, the prostitute was understood as a victim of unconstrained capitalism in at least two ways. She was exploited when she participated in the vice market itself, not only by the pimps and procurers who lived off her earnings but also by numerous other commercial interests (from costumers to midwives) that took advantage of her position as a consumer in the underground economy: “for everything she buys she pays more than a double price in actual dollars.”<sup>39</sup> She was also exploited by legitimate but immoral labor markets.<sup>40</sup> Not only were wages in factories and department stores insufficient, but long hours and unsanitary working conditions produced “enfeebling influences on [female] will power.”<sup>41</sup> Exhausted and “nervous” women, reformers argued, were more susceptible to sexual immorality.<sup>42</sup>

37. See *id.*; see also OLIVE SCHREINER, *WOMAN AND LABOR* 102–06 (1911); CHARLOTTE PERKINS STETSON, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* 63–64 (1898).

38. LOUISVILLE VICE COMM’N, *REPORT OF THE VICE COMMISSION: SURVEY OF EXISTING CONDITIONS WITH RECOMMENDATIONS TO THE HONORABLE JOHN H. BUSCHMEYER, MAYOR* 20 (1915); see also Roy Lubove, *The Progressives and the Prostitute*, 24 *HISTORIAN* 308, 309–10 (1962).

39. George J. Kneeland, *Commercialized Vice*, *PROC. ACAD. POL. SCI. CITY N.Y.*, July 1912, at 127, 128.

40. See MARK THOMAS CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* 30–32 (1980) (describing the “‘the wages-and-sin’ issue” more generally); see also WILLRICH, *supra* note 10, at 181–83 (describing the women’s wage campaign led by vice reformers and women’s organizations in Chicago).

41. THE VICE COMM’N OF CHICAGO, *THE SOCIAL EVIL IN CHICAGO: A STUDY OF EXISTING CONDITIONS* 45 (1911).

42. *Id.* at 199. Commentators debated the link between low wages, long working hours, and sexual immorality. For reports and articles advancing a causal connection, see, for example, *id.* at 198–213 (enumerating the difficulties working women faced in making a livable income and the temptations toward prostitution to fill the economic gap); ILLINOIS SENATE VICE COMM., *REPORT OF THE SENATE VICE COMMITTEE* 23, 28 (1916) (finding that “poverty is the principal cause, direct and indirect, of prostitution” and that “thousands of girls are driven into prostitution because of the sheer inability to keep body and soul together on the low wages received by them”); Maude Glasgow, *On the Regulation of Prostitution, with Special Reference to Paragraph 79 of the Page Bill*, 92 *N.Y. MED. J.*, 1320, 1323 (1910) (“The ranks of the prostitutes we know are recruited from

These early twentieth-century arguments against capitalist exploitation in both licit and illicit labor markets were thus highly gendered. They reflected a broader Progressive-era challenge to nineteenth-century free-labor orthodoxy *and* the particular and more limited ways this challenge constituted women as special subjects of state protection,<sup>43</sup> including by intertwining market exploitation with sexual exploitation. Indeed, when in 1908 the Supreme Court upheld a ten-hour workday law for women<sup>44</sup> (after striking one down three years earlier for men),<sup>45</sup> the majority reasoned that a woman's "physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the *greed* as well as the *passions* of man."<sup>46</sup>

In what follows, I briefly describe the views of a powerful group of (center-right) antvice and social hygiene reformers in New York City who played a significant role in creating the Women's Court based on such ideas of female dependency and commercial exploitation. In 1900, these crusaders organized the country's first vice commission, the Committee of Fifteen, to investigate prostitution.<sup>47</sup> The Committee's lengthy report, *The Social Evil*, concluded that "instead of punishment for the unfortunate women," laws and courts should be used "to better [their] conditions."<sup>48</sup> In 1905, the Committee of Fourteen replaced the Committee of Fifteen and continued its court-reform (and several other law- and policy-reform) missions.<sup>49</sup> Whereas early

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the mostly poorly paid occupations, where the strain of making ends meet proves too great for the half starved, anaemic girl, who succumbs to temptation when a life of ease and comfort is offered to her."); Edwin V. O'Hara, *Minimum Wage Legislation*, 4 WOMEN LAW. J. 49, 49 (1915) ("I believe that it can be said, justly, that wages in the vast field of retail trade rest upon knowledge that the payroll is eked out by the social evil."). For reports and articles questioning the link, see 15 MARY CONYNGTON, DEP'T OF COMMERCE & LABOR, REPORT ON CONDITIONS OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES: NO. 645, RELATION BETWEEN OCCUPATION AND CRIMINALITY OF WOMEN 79-114 (1911) (disputing the connection); THE COMM. OF FOURTEEN IN N.Y. CITY, DEPARTMENT STORE INVESTIGATION REPORT OF THE SUB-COMMITTEE 3, 11 (1915) (describing popular accounts of low wages and immoral working conditions as causes of prostitution but finding "no abnormal immorality" at Macy's, a department store with mostly adequate working conditions); *Are Low Wages Responsible for Women's Immorality?*, 54 CURRENT OPINION 402, 402 (1913) (debating the issue).

43. See MINOW, *supra* note 27, at 254-55; AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 232-33, 322-23 (2010).

44. *Muller v. Oregon*, 208 U.S. 412, 416, 423 (1908).

45. *Lochner v. New York*, 198 U.S. 45, 64-65 (1905).

46. WILLRICH, *supra* note 10, at 181 (citing *Muller*, 208 U.S. at 422) (emphasis in WILLRICH).

47. THOMAS C. MACKAY, PURSUING JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND NEW YORK CITY'S COMMITTEE OF FOURTEEN, 1920-1930, at 16 (2005).

48. THE COMM. OF FIFTEEN, THE SOCIAL EVIL WITH SPECIAL REFERENCE TO CONDITIONS EXISTING IN THE CITY OF NEW YORK 218, 220 (Edwin R.A. Seligman ed., 2d ed. 1912) (1902).

49. For more detail on the New York Committee of Fourteen, see MACKAY, *supra* note 47, at 15-34. For a contemporary history, see Rev. John P. Peters, President of the Committee of Fourteen, *The Story of the Committee of Fourteen of New York*, 4 J. SOC. HYGIENE 347 (1918).

nineteenth-century jurists and legislators often “stressed personal choice and responsibility, both for the prostitute and her patron,”<sup>50</sup> the Committee of Fourteen (and its elite feminist bedfellows) helped to create, in both popular and legal consciousness, a class of criminal defendants presumptively understood as market victims. As an association of women’s organizations put it, it was precisely because prostitution is not “just a personal matter, a transaction between two ‘free-willed’ people,” that the New York Women’s Court was needed as “a protection both to the girl and the city.”<sup>51</sup>

#### D. *New York City Vice Reformers and Commercial Exploitation*

To make the case for social and legal intervention, New York City vice reformers repeatedly stressed a single point: prostitution had become a large-scale *commercialized business* run by “middlemen who are profit sharers in vice.”<sup>52</sup> Committee of Fourteen President Rev. John P. Peters, for example, summarized the conclusion of a lengthy 1910 study as follows: “[T]he social evil in New York City is an elaborate system fostered by business interests, a commercialized immorality, not immorality resulting from emotional demand, and that consequently what must be fought is not vice per se, but vice as a gainful business.”<sup>53</sup> In 1913, John D. Rockefeller, Jr., who wielded a good deal of informal influence among Committee members, launched the Bureau of Social Hygiene.<sup>54</sup> The Bureau commissioned social worker George Kneeland to investigate the state of commercial sex in New York City. Kneeland, who began writing for the Committee, provided meticulous support for the claim that “[i]t is idle to explain away [prostitution] on the ground that [it is] the result[] of the inevitable weakness of human nature”; rather it is “widely and openly exploited as a business enterprise,” complete with stock exchanges that circulate shares in brothels based on calculations

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50. Robert E. Riegel, *Changing American Attitudes Toward Prostitution (1800–1920)*, 29 J. HIST. IDEAS 437, 437 (1968); see also FRIEDMAN, *supra* note 28, at 224; ROSEN, *supra* note 29, at 5–6; Shumsky, *supra* note 28, at 665.

51. *The Humanities Back of the Women’s Court*, N.Y. TRIB., Nov. 30, 1919, at E4 [hereinafter *Humanities*].

52. THE COMM. OF FOURTEEN, *THE SOCIAL EVIL IN NEW YORK CITY: A STUDY OF LAW ENFORCEMENT*, at xxxv (1910).

53. Peters, *supra* note 49, at 371 (describing the conclusions of THE COMM. OF FOURTEEN, *supra* note 52).

54. See DAVID J. PIVAR, *PURITY AND HYGIENE: WOMEN, PROSTITUTION, AND THE “AMERICAN PLAN,” 1900–1930*, at 47, 124 (2002). As Pivar explains: “An opportunity had presented itself to redefine boundaries of tolerance for business in an urban community. Rockefeller, like others in the business community, drew such lines between legitimate and illegitimate commercial business.” *Id.* at 174. For an overview of the Bureau, see *The Bureau of Social Hygiene*, 20 OUTLOOK 287, 287–88 (1913).

of risk, profit, and capital appreciation.<sup>55</sup> Reporting for the American Social Hygiene Association, Maude Miner, an important anti-prostitution feminist and court reformer in New York argued much the same: "The demand for prostitution exists not alone because of the passions of man, but because exploiters of vice are making money from stimulating the demand and raising it to meet the artificially stimulated supply."<sup>56</sup> That is, all these reformers deemed it crucially important to observe that market intermediaries had made twentieth-century prostitution into a large-scale commercial venture organized like any other "shrewdly managed" businesses that aimed to "artificially" stimulate demand and supply.<sup>57</sup>

It was precisely this level of business organization, New York City vice reformers argued, that made prostitution into sex trafficking or "white slavery"—a term used in the late nineteenth century to describe the exploitative conditions of Northern industrial labor and that in the early twentieth century had come instead to mean the distinctively sexual exploitation of women and girls (white as well as immigrant and nonwhite).<sup>58</sup> In response, reformers enacted protective legislation beginning with the U.S. accession to the International Agreement for the Suppression of the White Slave Traffic of 1904 (entered into force in the United States in 1908)<sup>59</sup> and, following the international treaty, the enactment of the federal Mann Act in 1910.<sup>60</sup> As David Langum explains, lawmakers often defined white slavery

55. GEORGE J. KNEELAND, *COMMERCIALIZED PROSTITUTION IN NEW YORK CITY* 51, 124 (1913). Kneeland, for example, describes a delicatessen on Seventh Avenue:

All the forces for the conduct of the business of prostitution in parlor houses are here, scheming, quarreling, discussing profits, selling shares, securing women, and paying out money for favors received. . . . The value of houses is debated, the income from the business, the expenses of conducting it, the price of shares to-day or to-morrow, or in the future, if this or that happens.

*Id.* at 61.

56. Maude E. Miner, *Report of Committee on Social Hygiene*, 1 J. SOC. HYGIENE 81, 83 (1914).

57. KNEELAND, *supra* note 55, at 84.

58. HAAG, *supra* note 27, at 69; *see also infra* notes 100–101 and accompanying text. A 1909 article in *McClure's Magazine* illustrates how popular writers emphasized both business organization and immigration to describe white slavery. George Kibbe Turner, *The Daughters of the Poor: A Plain Story of the Development of New York City as a Leading Center of the White Slave Trade of the World, Under Tammany Hall*, 17 MCCLURE'S MAGAZINE 45, 59 (1909) ("The trade of procuring and selling girls in America—taken from the weak hands of women and placed in control of acute and greedy men—has organized and specialized after its kind exactly as all other business has done. . . . All but twelve or fifteen per cent are of foreign birth or parentage.").

59. International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

60. The Mann Act, which criminalizes transporting any girl or woman across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose," was based on the interstate commerce clause and the international white slavery treaty. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)); DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* 40–



as “coerced prostitution.”<sup>61</sup> Many vice reformers, however, equated coercion simply with commercialization and business organization.<sup>62</sup> Harry Woolston, also recruited by the Bureau, observed the phenomenon: even when “girls remain in the business not unwillingly,” he noted, vice reformers have “extend[ed] the term white slavery to include practically the whole field of commercialized vice.”<sup>63</sup>

Indeed, even as federal investigations failed to find evidence of formal syndicates or corporations—only individual procurers and pimps<sup>64</sup>—vice reformers offered evidence of informal economic organization as its own proof of trafficking and exploitation. For example, a 1910 New York grand jury investigation of white slavery (led by Rockefeller) concluded that “individuals acting for their own individual benefit” are “known to each other and are more or less informally associated” in “associations and clubs [that] are analogous to commercial bodies in other fields.”<sup>65</sup> “‘Incorporated syndicates’ and ‘international bands,’” the report thus concluded, are comprised of “such informal relations.”<sup>66</sup>

Pamela Haag has thus argued that the primary innovation of early twentieth-century white-slavery discourse was to conflate impersonal economic relations—“commerce”—with exploitation and control. In her words:

The presence of “commerce” replaced “chaste character” . . . as presuppositional proof of woman’s *coercion* . . . . The discourse was

41 (1994). Panic about sex trafficking also prompted a series of (nativist) immigration reports and reform efforts. See, e.g., Egal Feldman, *Prostitution, the Alien Woman and the Progressive Imagination, 1910-1915*, 19 AM. Q. 192, 196 (1967); CONNELLY, *supra* note 40, at 49–60 (describing 1907 and 1910 amendments to the 1903 federal immigration act, designed to enhance the criminalization of prostitution-related immigration offenses).

61. LANGUM, *supra* note 60, at 42.

62. Of course, in 1917, the Supreme Court broadened the reach of the Mann Act in a seemingly different way when it upheld the prosecution of *noncommercial* nonmarital sex across state boundaries. *Caminetti v. United States*, 242 U.S. 470, 496 (1917). But as David Langum explains, this case should not be read as an assault on sexual immorality apart from commercialization; the holding, he submits, reflected the then-popular idea (which persisted into the 1920s) that “sexual immorality was but a stepping-stone toward professional prostitution.” LANGUM, *supra* note 60, at 128–29; see also WOOLSTON, *supra* note 28, at 174 (asserting that among “right-thinking citizens [the decision] has been applauded as a means of lessening the traffic in women under any excuse”).

63. WOOLSTON, *supra* note 28, at 159–60. He continues: “In this sense the meaning is much broader than that in which it is used in international agreements regulating the trade in women.” *Id.* at 160.

64. See, e.g., IMMIGRATION COMM’N, NO. 196, IMPORTING WOMEN FOR IMMORAL PURPOSES 30 (1909) (“The belief that a single corporation is largely controlling this traffic in the United States is doubtless a mistake.”).

65. GRAND JURY FOR THE JAN. TERM OF THE COURT OF GEN. SESSION OF THE CTY. OF N.Y., IN THE MATTER OF THE INVESTIGATION AS TO THE ALLEGED EXISTENCE IN THE CTY. OF N.Y. OF AN ORGANIZED TRAFFIC IN WOMEN FOR IMMORAL PURPOSES, WHITE SLAVE TRAFFIC 6 (1910).

66. *Id.*

not geared toward *moral* persuasion against prostitution—a common feature of late nineteenth-century sexual reform—but toward an epistemological revision, an effort to cast commercial sexuality as a *prima facie* violence.<sup>67</sup>

This “epistemological revision” clearly influenced law reform—spawning, for example, a dramatic increase in states with “white slave laws,” from five in 1890, to twenty-two in 1910, and forty-eight in 1921.<sup>68</sup> Abraham Flexner, also recruited by Rockefeller and the Bureau, explained that social tolerance for “voluntary immoral relations . . . even if the women regularly earn their livelihood in that way” gave way to new “laws against the exploitation of prostitution for the benefit of third parties” when public opinion was made to understand how prostitution reflects “the commercial interest of the exploiter.”<sup>69</sup>

But even if, as Haag has argued, white slavery presupposed that prostitutes were victims of impersonal economic forces rather than agents of their own self-interest, practice on the ground confounded this new discursive commitment—making court reform for prostitutes a more complex endeavor. To begin, women’s own responses to the multiple studies reformers commissioned made it difficult for the Committee of Fourteen to sustain any totalizing description. Kneeland, for example, referenced one well-known study and reported that “[t]he surprising thing is that very few directly economic reasons are given” to explain what led women “into an immoral life.”<sup>70</sup> And it would seem that even fewer women themselves suggested white slavery.<sup>71</sup> Some women, Kneeland reported, “deliberately select a pimp” for business help.<sup>72</sup> Woolston was more explicit: “The atmosphere of the stock exchange is pervasive. When a girl realizes that she can secure many desirable things by the exercise of a little business judgement, the way is open to capitalize her personal charms.”<sup>73</sup> Thus for vice reformers, the

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67. HAAG, *supra* note 27, at 65.

68. JOSEPH MAYER, *THE REGULATION OF COMMERCIALIZED VICE: AN ANALYSIS OF THE TRANSITION FROM SEGREGATION TO REPRESSION IN THE UNITED STATES* 31 (1922).

69. Abraham Flexner, *Next Steps in Dealing with Prostitution*, 1 J. SOC. HYGIENE 529, 533 (1915).

70. KNEELAND, *supra* note 55, at 185 (describing a study of prostitutes from New York City sentenced to the State Reformatory for Women at Bedford Hills).

71. According to Rosen, who analyzed multiple Progressive-era studies, “of 3,117 prostitutes, only 2.8 percent specifically cited white slavers and 11.3 percent accused men (lovers, seducers, etc.) of having actively forced, seduced, or betrayed them into prostitution.” ROSEN, *supra* note 29, at 145. On white slavery, Rosen explains that “[a]lthough its incidence during the Progressive Era was highly exaggerated, [it] does play a part in the story of prostitution,” but around, she ventures, less than ten percent of the prostitute population. *Id.* at xiv, 133.

72. KNEELAND, *supra* note 55, at 89.

73. WOOLSTON, *supra* note 28, at 307. He writes: “Prostitution seems the easiest way to make money, after the woman has overcome her repugnance to it. Apparently, most of the women interviewed intend to continue, so long as they can support themselves in this fashion.” *Id.* at 72–73.

moral case for economic victimhood was hardly complete: the prostitute was at once a sympathetic market victim due to a combination of economic necessity and the many "commercial interests" that exploited her, but also potentially a degenerate market participant due to her own desire for surplus commodities and new forms of consumption.

As the following sections explore, this distinction—arguments for sympathy, dependency, and state intervention based on large-scale forms of commercial exploitation, on the one hand, and moral condemnation and personal responsibility based on market participation, on the other—ordered a good deal of practice in the New York Women's Court.

#### *E. The New York Women's Court*

Vice reformers made clear that commercialized sex in New York City had not only corrupted the institutions of the market but also the state. Reports circulated that police, judges, and bondsmen collaborated to detain women at night on false prostitution charges in order to encourage them to pay a bond to secure their release pending a court hearing the following day.<sup>74</sup> It was in response to such allegations that Manhattan first opened a specialized Night Court in 1907 to hear prostitution offenses immediately after arrest.<sup>75</sup> That same year the Committee of Fourteen organized a subcommittee to investigate "the relation of the magistrates' courts to the women of the street [in New York City]."<sup>76</sup>

In 1910, with much advocacy from the Committee, New York enacted the Inferior Criminal Courts Act (known as the Page Law, named after its Chairman, Senator Alfred R. Page).<sup>77</sup> The Act separated the Manhattan night court into separate courts for male and female offenders in order to "give an opportunity for concentration of effort in relation to cases of women and [to] enable those philanthropically inclined more effectively to give their

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74. See, e.g., Franklin Matthews, *The Farce of Police Court Justice in New York: Magistrates, Lawyers, Ward Heelers, Professional Bondsmen, Clerks of the Court and Probation Officers Join to Make a Mockery of the "Supreme Court of the Poor,"* BROADWAY MAGAZINE, Feb. 1907, at 511, 517.

75. See STATE OF N.Y., NO. 54, FINAL REPORT OF THE COMMISSION TO INQUIRE INTO THE COURTS OF INFERIOR CRIMINAL JURISDICTION IN CITIES OF THE FIRST CLASS 47 (1910) [hereinafter FINAL REPORT NO. 54]. The report explained:

The purpose of [the night court] was to put a stop to the evil known as the station-house bond. It was claimed that certain of the police and certain bondsmen were in league, so that by constant arrests of prostitutes these women were compelled to get bail in order to be released until the following morning, and for that bail to pay heavily to the professional bondsmen.

76. THE COMM. OF FIFTEEN, *supra* note 48, at xi.

77. Inferior Criminal Courts Act of the City of New York, Laws of New York, 1910, ch. 659 (hereafter citations to the Inferior Criminal Courts Act are from the annotated version of the Act, reproduced in COBB, *supra* note 23); MACKEY, *supra* note 47, at 24.

assistance to the prisoners as well as to the magistrates and probation officers."<sup>78</sup> In 1919, the city transformed the Women's Night Court into the Women's Court with daytime hours (at the urging of women's organizations that argued that consolidated nighttime activity created a spectacle for onlookers as well as easy opportunities for procurers looking for recruits).<sup>79</sup>

Reformers lauded the court's welfarist mission. Committee Executive Secretary Frederick Whitin, who regularly attended court sessions,<sup>80</sup> hailed the Women's Court for "deal[ing] more wisely and hence more effectively with the social evil,"<sup>81</sup> and his colleague on the Committee, Lawrence Veiller (famous for his work improving housing conditions for the poor), called it "one of the great humanitarian institutions" in New York.<sup>82</sup> Mary Paddon, Secretary of the Committee on Criminal Courts of the Charity Organization Society (chaired by Veiller), likewise explained that magistrates with special expertise in prostitution would "sincerely try to decide what is best for the future of the individual before them as well as for the community."<sup>83</sup>

Despite such praise for the Women's Court, the Inferior Criminal Courts Act was controversial. It instantiated new forms of judicial social control strongly supported by the Committee but opposed by some feminists. First, the Act empowered magistrates to fingerprint all arrested women<sup>84</sup> and thus, as the Committee repeatedly encouraged, to keep track of recidivist offenders committed to profiting from the life and to distinguish such offenders from

78. See FINAL REPORT NO. 54, *supra* note 75, at 50. The Women's Court had jurisdiction over prostitution offenses as well as petty larceny and wayward girls. COBB, *supra* note 23, cmt. at 273-74. For more details, see Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 BROOK. L. REV. 133, 173 & n.241 (1937).

79. Paddon, *supra* note 22, at 11; *Humanities*, *supra* note 51, at E4.

80. MACKEY, *supra* note 47, at 25. The Committee regularly advised judges and commissioned reports tracking arrests and dispositions, and proposed recommendations "to make the work of the [c]ourt more effective." THE COMMITTEE OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1915, at 13 (1916) [hereinafter ANNUAL REPORT 1915]. As one observer wrote, Committee members "dominated the Women's Court because they considered its business part of their special province." MOLEY, *supra* note 19, at 118; see also MACKEY, *supra* note 47, at 206 (describing the Committee's "daily long-standing contact with the Women's Court").

81. Frederick H. Whitin, *The Women's Night Court in New York City*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1914, at 181, 181; see also THE COMMITTEE OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1916, at 54 (1917) ("On the basis of an intimate knowledge extending now over many years, the Secretaries [of the Committee] believe this Court to be most effective in suppressing commercialized vice and in saving many women.").

82. MACKEY, *supra* note 47, at 159. On Veiller's role in enacting housing legislation, see MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 171-78 (1986).

83. Paddon, *supra* note 22, at 12.

84. COBB, *supra* note 23, at 279 (Inferior Criminal Courts Act § 78). On the use of fingerprinting generally, see BD. OF CITY MAGISTRATES OF THE CITY OF N.Y. (FIRST DIV.), ANNUAL REPORT FOR THE YEAR ENDING DECEMBER 31, 1912, at 20-21 (1913) [hereinafter ANNUAL REPORT 1912].

sympathetic victims.<sup>85</sup> Women's groups, however, pointed to the discriminatory effects of fingerprinting all arrested women. The 1909 New York code of criminal procedure made it easier to convict sellers of sex for solicitation,<sup>86</sup> and that year more than 1,500 women, but none of their customers, had been arrested for prostitution.<sup>87</sup> Likewise the Committee openly supported a lax and discretionary approach to arrest and prosecution because "a conviction in [the Women's Court]," it argued, "is frequently the means of turning the woman from the life of shame."<sup>88</sup> Feminists, by contrast, demanded greater procedural protections and more rigorous and uniformly applied evidentiary standards for arrest and prosecution.<sup>89</sup>

Even more controversial, the Inferior Criminal Courts Act empowered magistrates to order convicted defendants to submit to physical exams and to detain diseased women for up to a year.<sup>90</sup> Medical testing, the Women's Prison Association and several other feminist organizations argued, made the Women's Court "a 'clearing house' for prostitutes, marking those who were 'safe for public use.'"<sup>91</sup> Mandatory medical testing was declared unconstitutional in 1911,<sup>92</sup> although magistrates could threaten to withhold

85. See Whitin, *supra* note 81, at 184–85; ANNUAL REPORT 1912, *supra* note 84, at 20; see also Frederic Bierhoff, *The Problem of Prostitution and Venereal Diseases in New York City*, 93 N.Y. MED. J. 557, 560 (1911) ("I believe that the woman who has been a successful public prostitute—that is, one who has been able to make enough money to buy her the comforts and the finery and drink which she wants, is rarely won permanently from that life." (emphasis omitted)). As Pivar recounts, Bierhoff, a physician, had a longstanding influence on Whitin. PIVAR, *supra* note 54, at 96.

86. Specifically, the 1909 code classified prostitution as a form of vagrancy (expanding an 1882 definition of prostitution as a form of disorderly conduct). N.Y. CRIM. PROC. § 887(4) (1909). George Worthington and Ruth Topping suggest "that much less proof is necessary to convict under [the vagrancy definition]." George E. Worthington & Ruth Topping, *The Women's Day Court of Manhattan and the Bronx*, New York City, 8 J. SOC. HYGIENE 393, 403 (1922); see also WILLOUGHBY CYRUS WATERMAN, PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY: 1900–1931, at 20 (1932) (describing a 1915 amendment to section 887 to further "simplify the task of the police in securing evidence").

87. PIVAR, *supra* note 54, at 100 (describing the views of the Woman's Prison Association). I should add: Patronizing a prostitute did not become a criminal offense in New York until 1965. See Pamela A. Roby, *Politics and Criminal Law: Revisions of the New York State Penal Law on Prostitution*, 17 SOC. PROBS. 83, 93 (1969) (tracing legislative debates). Thomas Mackey details efforts in the 1920s by the Committee of Fourteen and their feminist allies to prosecute customers, first, with a failed test case under § 887(4), and then by sponsoring a failed "customer amendment" to the law. See generally MACKEY, *supra* note 47, at 29–30.

88. ANNUAL REPORT 1915, *supra* note 80, at 14–15.

89. See, e.g., Bertha Rembaugh, *Problems of the New York Night Court for Women*, 2 WOMEN LAW. J. 45, 45 (1912); *Night Court Suggestions*, 5 WOMEN LAW. J. 13, 13 (1915).

90. COBB, *supra* note 23, at 280–81 (Inferior Criminal Courts Act § 79).

91. GILFOYLE, *supra* note 33, at 258.

92. *People ex rel. Barone v. Fox*, 96 N.E. 1126, 1126 (N.Y. 1911); GILFOYLE, *supra* note 33, at 258–59.

bail if they wanted a defendant to submit to an exam, and in 1918 compulsory testing was reenacted and upheld in new form.<sup>93</sup>

Other early procedural reforms, even as they intensified the social controls available to the court, were less contested. In 1912, New York abolished the practice of levying fines as punishment for prostitution, in turn expanding often indeterminate forms of sentencing and parole.<sup>94</sup> Replacing fining with custodial sentences was perceived as necessary to extricate the court from the business of vice. As one study later summarized this policy decision: "Fining makes the city a partner in the business in that it becomes a sharer in the proceeds. It has been well stated that such a system makes of the city a 'super-pimp.'"<sup>95</sup>

Indeed, in a particular historical moment when the social problem of prostitution was often articulated in the language of big business and market exploitation, it was a pressing question for court reformers whether the Women's Court was participating in the markets it was supposed to suppress (quite different, we shall see, from the contemporary concern with whether courts are re-traumatizing the victims they are supposed to heal). For this reason, the history of the Women's Court is often told, as Chief City Magistrate John Murtagh put it, as "an effort to counteract the scandal and corruption that have historically characterized the city's efforts to deal with the problem of prostitution."<sup>96</sup> In what follows, I do not describe the many scandals that beset the court. Instead, I briefly sketch the core procedural features that were supposed to guide its welfarist practice.

## F. Court Practice

1. *The "Individual Method" as Social and Moral Classifications.*—The women processed through the court did not receive a blanket presumption of

93. See *infra* note 126 and accompanying text.

94. ANNUAL REPORT 1912, *supra* note 84, at 24–25 ("Not a dollar of such blood money ought ever go into the City Treasury.").

95. Worthington & Topping, *supra* note 86, at 429; see also Miner, *supra* note 56, at 89 (describing fining as "a license system"); Maude E. Miner, *Two Weeks in the Night Court*, 22 SURVEY 229, 230 (1909) ("Imposing fines brings into the city coffers money it should not be willing to accept . . .").

96. John M. Murtagh, *Problems and Treatment of Prostitution*, 23 CORRECTION 3, 3 (1958). Murtagh argued that corruption on the court continued until 1950. In 1932, a widely publicized inquiry described a "ring" in the Women's Court comprising of unscrupulous lawyers, bondsmen, "fixers," policemen, and their stool pigeons that profited from false arrests and extortion aided by "the inexplicable inaction of the Magistrates." SAMUEL SEABURY, FINAL REPORT IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES' COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS 125 (1932) [hereinafter SEABURY REPORT]; see also MOLEY, *supra* note 19, at 119–28 (describing corruption).

victimization as white slavery and commercialization discourse might suggest. Instead, they were classified and sorted in numerous ways. Here, to begin, is a snapshot of the court in action:

[T]he main entrance to the building is thronged with women offenders, shyster lawyers, professional bondsmen, men who appear to be pimps . . . .

. . . .

A low iron railing separates the spectators from the court proper. Immediately in front of the railing are two rows of benches which during court hours are occupied by members of the vice squad, probation officers, welfare workers, etc.<sup>97</sup>

Of these “women offenders” efforts were made to send juveniles to private institutions such as the Florence Crittenton home or the Waverley House so that they could await trial under the supervision of social workers and probation officers.<sup>98</sup> Adults were sent to a female detention center where they were in turn separated by the character of the offense as well as by race.<sup>99</sup> Reformers knew well that white slavery was a misnomer<sup>100</sup> (indeed, evidence suggests that nonwhite women were disproportionately arrested on prostitution charges),<sup>101</sup> and social workers and private organizations were organized in sectarian fashion: “Catholic, Protestant, Jewish and Colored.”<sup>102</sup>

In advance of sentencing, probation officers were then charged with learning something of a defendant’s moral character, abilities, and health in order to aid magistrates in assessing her “honesty or dishonesty[,] . . . her demeanor, her lack of defiance, her apparent state of intelligence, and the character of the offense committed.”<sup>103</sup> Maude Miner, the first female probation officer in the Women’s Court, called this the “*individual method* of dealing with girls and women.”<sup>104</sup> These assessments were supposed to produce information about how open to “moral influence” defendants appeared.<sup>105</sup> As Miner explained, “[i]t is not merely a question of age or

97. WORTHINGTON & TOPPING, *supra* note 22, at 292.

98. *Id.* at 295; MAUDE E. MINER, *SLAVERY OF PROSTITUTION: A PLEA FOR EMANCIPATION* 162–64 (1916).

99. WORTHINGTON & TOPPING, *supra* note 22, at 295; *see also* COBB, *supra* note 23, at 271–72 (Inferior Criminal Courts Act § 77) (“[I]n such detention place the young and less hardened shall be segregated, so far as practicable, from the older and more hardened offenders.”).

100. *See* HAAG, *supra* note 27, at 69.

101. *See* WILLRICH, *supra* note 10, at 205–06 (describing a “racist system of public morals enforcement” in the Chicago Morals Court in the 1920s).

102. WORTHINGTON & TOPPING, *supra* note 22, at 297.

103. *Id.* at 314; ANNUAL REPORT 1912, *supra* note 84, at 21.

104. MAUDE E. MINER, *THE INDIVIDUAL METHOD OF DEALING WITH GIRLS AND WOMEN AWAITING COURT ACTION* 9–11 (1922).

105. MINER, *supra* note 98, at 198.

experience or number of arrests, but of poisoned minds, diseased bodies and weakened wills."<sup>106</sup>

As such, probation officers, Miner argued, should elicit the defendant's story at length, including details of her childhood, education, religion, "health and habits[,] . . . home and family, [and] her first steps in immorality."<sup>107</sup> Other professionals, she advised further, should conduct a comprehensive physical and mental exam that furnishes information not simply about the defendant's health and mental capacity but also her "abilities, limitations, and general efficiency."<sup>108</sup> Practice in the court, it would seem, often fell short of this vision (Miner repeatedly complained that investigations were insufficiently individualized and superficial).<sup>109</sup> But Chief Magistrate William McAdoo made clear his sentences were motivated by Miner's general commitments:

Every conscientious and right-thinking magistrate, however experienced, will, I think, admit how difficult it is, in many cases, to satisfy his conscience and his intelligence in fixing the measure of punishment without investigation and identification of the defendant. With the use and the services of the probation officers, properly applied, and the taking of fingerprints the whole status of the defendant can be definitely and conclusively ascertained before judgment is pronounced.<sup>110</sup>

As the following section suggests, McAdoo's estimation of the "whole status of the defendant" rested, in no small part, on whether she was understood as market victim or market participant.

*2. Social Control as Moral and Behavioral Reform for Deserving Market Victims.*—Social controls followed from social and moral classifications. Probation was reserved for "a very limited group of the younger girls who are physically, mentally, and morally fit to go out into society without commitment to an institution."<sup>111</sup> Miner illustrated a compelling case: A "small, pale-faced girl . . . drops her head and tears come into her eyes. 'I did it to support my little baby and me.' . . . [S]he excites our interest and sympathy. She is a girl whom we can help."<sup>112</sup> McAdoo offered another example. He described a young woman in need of money

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106. Maude E. Miner, *Probation Work for Women*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1910, at 27, 28.

107. MINER, *supra* note 98, at 165.

108. *Id.* at 169.

109. MINER, *supra* note 104, at 9–11.

110. ANNUAL REPORT 1912, *supra* note 84, at 21.

111. Miner, *supra* note 56, at 89.

112. Miner, *supra* note 95, at 229.



for family members “in great want” in the old country who “after a short probationary period was entirely reformed.”<sup>113</sup> In both cases, these women were easily understood as market victims—acting out of economic necessity to earn money for their families. They were therefore placed under the care of probation officers who were supposed to connect them to social agencies (hospitals, dental clinics, relief societies, churches), help find them legitimate employment, and generally supervise “their efforts to lead honest lives.”<sup>114</sup> Miner, for example, describes her own extensive efforts to find the girls placed under her care food and temporary housing.<sup>115</sup>

Defendants with multiple convictions could receive purely punitive sentences to the workhouse on Blackwell’s Island (either a determinative sentence of up to six months or indeterminate sentences of up to two years with the possibility of parole).<sup>116</sup> Here, McAdoo explained, he distinguished between different kinds of market actors: “the professional disorderly woman, determined to make her living by this infamous trade” yet perhaps capable of reform versus “the incorrigible streetwalker, who has been many times convicted and who is apparently beyond all reformatory influences . . . poisoning the community morally and physically for the amount of money she could make out of it.”<sup>117</sup> The incorrigible streetwalker was punished for her transgressions and sent to the workhouse.<sup>118</sup>

The professional disorderly woman—who appeared to the court somewhere in between these two poles of incorrigible market actor and compelling market victim—was potentially subject to the most intensive social controls: she was granted an opportunity to reform with intensive “moral and industrial training.”<sup>119</sup> She could receive an indeterminate sentence of up to three years at a state or private institutional reformatory with parole at the parole commission’s discretion based on a series of social and behavioral classifications.<sup>120</sup> Miner, for example, describes how the State Reformatory for Women at Bedford aimed to help women develop as

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113. CITY MAGISTRATES’ COURTS OF THE CITY OF N.Y. (FIRST DIV.), ANNUAL REPORT FOR THE YEAR ENDING DECEMBER 31, 1914, at 21 (1915) [hereinafter ANNUAL REPORT 1914].

114. MINER, *supra* note 98, at 202, 212.

115. *Id.* at 163–64.

116. COBB, *supra* note 23, at 320 (Inferior Criminal Courts Act § 89(4)); Parole Commission Act, ch. 579, § 4, in 10 SUPPLEMENT TO ANNOTATED CONSOLIDATED LAWS OF THE STATE OF NEW YORK (1915).

117. ANNUAL REPORT 1914, *supra* note 113, at 20–21.

118. *Id.* at 21.

119. *See* Miner, *supra* note 56, at 89.

120. COBB, *supra* note 23, at 318–20 (Inferior Criminal Courts Act § 89(1)–(2)); Parole Commission Act, ch. 579, §§ 4–5. Reformatories included The Roman Catholic House of the Good Shepherd, The Protestant Episcopal House of Mercy, The New York Magdalen Benevolent Society, and the State Reformatory for Women at Bedford. For descriptions, see Worthington & Topping, *supra* note 86, at 476–87.

“social being[s]” prepared for reintegration into legitimate social life.<sup>121</sup> “The best results,” Miner argued, “are obtained in classifying women within the reformatory not by their offenses, but according to their character, health, mental characteristics, and adaptabilities for certain kinds of work.”<sup>122</sup> Useful distinctions thus included “healthy and diseased, women of normal mentality, psychopathic women and feeble-minded women, mothers with babies, colored and white women, and moral and immoral women of various degrees of experience.”<sup>123</sup> Based on these distinctions, reformatory staff would set about

the tremendous task of inculcating new habits of work and training for future employment, developing mental resources and desire for wholesome amusement, teaching self-control and principles that govern right living, and laying that deep spiritual foundation which will determine ultimate failure or success.<sup>124</sup>

Or at least that was Miner’s vision: spiritual pedagogy and industrial training to remoralize individual character and inculcate the productive skills and behaviors deemed appropriate to particular classes and categories of women.

That said, after the United States entered World War I, concerns about the moral and social lives of fallen women gave way to a second set of concerns and controls in the name of public health.<sup>125</sup> In 1918, a war-time public health law reauthorized mandatory medical testing.<sup>126</sup> The presence of venereal disease would soon eclipse the court’s other social missions. Magistrates, who now received the results of medical testing at sentencing, would offer women with venereal disease the chance to submit to in-patient hospital treatment *if* they appeared eligible for probation. (The magistrate would later hear evidence of how defendants “demeaned” themselves during treatment to determine whether they continued to merit probation.)<sup>127</sup> Other infected women, including first offenders, could receive 100-day sentences in reformatories or in the workhouse—for no reason other than this was the number of days thought sufficient to weather the course of most infections.<sup>128</sup>

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121. MINER, *supra* note 98, at 238–40.

122. *Id.* at 233.

123. *Id.*

124. *Id.* at 237.

125. See ROSEN, *supra* note 29, at 33–36.

126. In 1918, the federal Chamberlain–Kahn Act empowered local health boards to detain people suspected of venereal disease to protect America’s troops, and it authorized new state legislation. Chamberlain–Kahn Act, Pub. L. No. 65-193, 40 Stat. 845, 886–87 (1918). Based on this Act, New York passed a public health law that mandated that anyone convicted of a prostitution-related offense be reported to the Board of Health that the Women’s Court used to authorize medical testing. W. Bruce Cobb, *The Women’s Court in its Relation to Venereal Diseases*, 6 J. SOC. HYGIENE 83, 87–88 (1920).

127. WORTHINGTON & TOPPING, *supra* note 22, at 312.

128. One magistrate explained:

3. *Routinization and Critique.*—By the 1920s, it would seem that procedure in the Women's Court had become mostly routinized based on the results of medical testing and recidivism rates rather than "the individual method" Miner and other feminists desired.<sup>129</sup> And for all of its social welfarist rhetoric, it would also seem that most defendants processed through the Women's Court experienced traditional forms of punishment. Between 1911 and 1929, records of court dispositions suggest that workhouse sentences hardly dropped below 50%. Between 1911 and 1920 workhouse sentences ranged between roughly 55% and 80%; reformatory sentences ranged from around 2% to 15%; and probation ranged from roughly 5% to 30%.<sup>130</sup> Between 1920 and 1929, workhouse sentences ranged from 44.5% to 62.2%; reformatory sentences ranged from 6.5% to 16.9%; and probation ranged from 26.9% to 36.8%.<sup>131</sup>

Woolston suggests that this high percentage of workhouse sentences reflected limited reformatory space more than retributivist impulses.<sup>132</sup> For feminist reformers, however, this defense was beside the point. As Anna Moscovitz Kross, the first female magistrate in the Women's Court, put it: "The most ardent supporters of the Women's Court are forced to concede that its work of rehabilitation, through probation officers and cooperating social agencies, has at best been very limited."<sup>133</sup> She blamed the "vindictive spirit" of the Committee of Fourteen for a court system that was "punitive and repressive" rather than paternalistic in the more enlightened manner of the juvenile court.<sup>134</sup> That "the state has always been paternalistic toward its children," Kross explained, "should . . . [not] preclude from its beneficence a

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Whereas it is no doubt true that in theory the 100-day sentence is not proper because it requires a consideration of the physical condition of the defendant rather than her delinquency, yet as practiced at the present time, it appears that this sentence is applied to the class of defendants to whom the magistrate might well be justified in giving a sentence of that length.

*Id.* at 337. Over a six-month period in 1920, of the 230 confirmed cases of venereal disease, over half were treated solely at the hospital and over one-third were treated at least partially during sentenced time at the workhouse. *Id.* at 340–41.

129. See, e.g., THE COMM. OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1921, at 20–21 (1922).

130. THE COMM. OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1920, at 35 fig. (1920).

131. WATERMAN, *supra* note 86, at 74 tbl.

132. WOOLSTON, *supra* note 28, at 74.

133. Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 444 (1938). For a detailed description of Anna Moscovitz Kross's criticisms of the court over the first three decades of its operation, see Mae C. Quinn, *Revisiting Anna Moscovitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 677–87 (2006).

134. ANNA M. KROSS, *The New Plan*, in REPORT ON "PROSTITUTION AND THE WOMEN'S COURT" 4, 12 (1935).

class of its citizenry that is just as much in need of mental and social guidance as its siblings.”<sup>135</sup> In the mid-1930s, she called for the abolition of the Women’s Court and lobbied extensively for an alternative vision: a medical–psychological–legal tribunal that would deploy medical–social workers rather than police to apprehend women, and that would exhaustively investigate rather than prosecute them.<sup>136</sup> Rules of evidence, she argued, would not apply because only treatment, not punishment, would follow—just as in the juvenile court where the sole “object of the court is [the defendant’s] welfare.”<sup>137</sup>

Of course, as the history of the juvenile court makes all too clear, treatment and punishment, like social welfare and social control, are not opposite but rather mutually constitutive projects.<sup>138</sup> And the particular ways they intertwine express a broader cultural and political context.<sup>139</sup>

#### G. *The New York Women’s Court and the American Welfare State*

In the 1910s and early 1920s, court reformers cast their own efforts to suppress prostitution as part of a movement for “a new body of law which expresses a growing social conscience with reference to wealth, power and official responsibility” in response to “economic and political and industrial changes.”<sup>140</sup> The Women’s Court was thus created amidst elite and popular concerns about unregulated, concentrated, and exploitative labor and consumer markets in legitimate as well as illegitimate sectors of the economy. In this way, the court reflected a broader Progressive-era ambition to deploy arguments about the dangers of unregulated capitalism as the basis for social and legal reform. It also reflected a broader Progressive-era trend to transform the role of lower courts in society. New centralized municipal courts developed specialized socialized branches to manage the problems of urban industrial life. As we have seen, in the Women’s Court, idealistic court reformers hoped to identify deserving defendants and to adjust their self-

135. *Id.* at 39.

136. ANNA M. KROSS, *Foreword*, in REPORT ON “PROSTITUTION AND THE WOMEN’S COURT,” *supra* note 134, at 5; ANNA M. KROSS, *The Women’s Court Today: A Challenge*, in REPORT ON “PROSTITUTION AND THE WOMEN’S COURT,” *supra* note 134, at 2; *see also Mrs. Kross Opposed to Women’s Court*, N.Y. TIMES, Oct. 19, 1934, at L25; *Mrs. Kross Scores Vice Case Methods*, N.Y. TIMES, Jan. 14, 1934, at F24; *see generally The New Plan*, in REPORT ON “PROSTITUTION AND THE WOMEN’S COURT,” *supra* note 134.

137. KROSS, *supra* note 135, at 57–58.

138. *See generally* LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 118 (1980); MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920* (1995); ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (40th Anniversary ed. 2009) (1969).

139. *See, e.g.*, GARLAND, *supra* note 1, at 10; Kohler-Hausmann, *supra* note 1, at 88–89.

140. THE COMM. OF FOURTEEN, *supra* note 52, at xiv.

understandings and social behavior. They envisioned a transformed woman: someone with “a job which will pay a decent living wage . . . a new home, new friends, new interests, and . . . the morale she lost [restored].”<sup>141</sup> This was the case, I should stress, both for feminist court reformers and Committee members, even if they disagreed about for whom and how such aid should be forthcoming.

It is in this sense that the New York Women’s Court should be understood broadly as part of a new generation of courts that, as Michael Willrich has argued, laid “an urban seedbed for the modern administrative welfare state.”<sup>142</sup> To be sure, it would seem that the Women’s Court actually administered few redistributivist forms of social welfare, even if probation officers were formally tasked with bringing goods like shelter, employment, and healthcare to sympathetic defendants. Raymond Moley, who advised Franklin D. Roosevelt and coined the phrase the “New Deal,”<sup>143</sup> squarely criticized the Women’s Court in a book devoted to assessing Progressive-era courts as “Tribunes of the People.”<sup>144</sup> Like other commentators, he concluded that the court failed to provide “socially constructive work affecting the health, employment, or the recreation of . . . offenders.”<sup>145</sup> It is nonetheless the case, as I have illustrated here, that the Women’s Court was motivated by a set of arguments about exploitation and the need for state protection created by new industrial and commercial conditions—arguments that both reflected and prefigured more general claims for state aid that would become institutionalized during the New Deal.<sup>146</sup> As Aziz Rana has argued, during the New Deal, lawmakers

presented the historical dependence of women not as an exceptional status to be contrasted against republican citizenship but as typical of the general position confronting all Americans. Regardless of gender or race, citizens faced assorted economic and social crises that could

141. Kross & Grossman, *supra* note 133, at 444.

142. WILLRICH, *supra* note 10, at xxi.

143. MACKAY, *supra* note 47, at 34.

144. MOLEY, *supra* note 19 (citing SEABURY REPORT, *supra* note 96, at 149–51). The Seabury Report proceeds to criticize court officers more broadly for “routine handling at best,” lacking “human warmth, sympathy and understanding in dealing with [the] girls.” SEABURY REPORT, *supra* note 96, at 150.

145. MOLEY, *supra* note 19, at 154 (citing SEABURY REPORT, *supra* note 96, at 149–51).

146. In 1932, Roosevelt famously declared that the aim of government was “to assist in the development of an economic declaration of rights, an economic constitutional order”—one in which, as Sidney Milkis and Jerome Mileur explain, “[t]he traditional emphasis in American politics on individual self-reliance should give way to a new understanding of the social contract in which the government guaranteed individual men and women protection from the uncertainties of the marketplace.” Sidney M. Milkis & Jerome M. Mileur, *Introduction: The New Deal, Then and Now*, in *THE NEW DEAL AND THE TRIUMPH OF LIBERALISM* 1, 3 (Sidney M. Milkis & Jerome M. Mileur eds., 2002) (debating the extent to which Roosevelt’s ambition to create an economic constitutional order in fact influenced the American welfare state).

be addressed only by state supervision. . . . The benefit of social inclusion lay precisely in state protection.<sup>147</sup>

In the 1930s, arguments for state protection increasingly assumed two kinds of administrative forms. The first form was provisions aimed at unemployed laborers—many of whom had become understood as victims of markets made unstable because they were regulated by corporations unchecked by states.<sup>148</sup> At the federal level, aid aimed at laborers began in the early 1930s with New Deal public-works programs and then, in 1935, became a reasonably robust set of programs for many (albeit certainly not all) workers, including old-age insurance (Social Security) and unemployment compensation enshrined in the Social Security Act. (To be sure, these social provisions are rarely considered “welfare” even though benefits are not proportional to the taxes beneficiaries pay.)<sup>149</sup> The second category, also enshrined in the Social Security Act, provided public assistance—“welfare”—for a subset of the “deserving” poor understood as entitled to some protection from the demands of wage labor, most classically widows with children (a measure, I should add, influenced by state and city experimentation with “mothers’ pensions”—that is, payments to widows and deserted mothers supported by purity feminists in part to protect against the temptations of selling sex).<sup>150</sup> What was then called Aid to Dependent Children was both more miserly and more stigmatizing than public aid programs for workers, leading in the 1930s to what Linda Gordon has described as a two-tiered and gendered welfare state.<sup>151</sup>

Women in their identities as *prostitutes* could claim neither welfare category—wage worker or dependent mother. I have argued nonetheless that, in the first few decades of the twentieth century, the Women’s Court illustrated an experiment in the broader welfarist logics of its time. In its rhetoric, albeit often not in its practice, the court aimed to “help” women whose lives were made marginal and unstable by poverty and commercial exploitation through programs of moral and social enculturation and occasionally a small measure of material aid.

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147. RANA, *supra* note 43, at 323.

148. See MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 73–78 (1984).

149. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 5 (1994).

150. PIVAR, *supra* note 54, at 55–56. On maternalist public social provisions created between 1900 and the early 1920s, and their role in influencing (albeit in incomplete and limited ways) broader American social welfare programs, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 534–36 (1992).

151. See GORDON, *supra* note 149, at 6–12.

### H. Institutionalization: The 1940s and Beyond

The Progressive era marked a high-water moment of judicial experimentation in lower civil and criminal courts. As we have seen, in urban jurisdictions throughout the United States, such courts were not simply instruments of dispute resolution or criminal adjudication but new institutions of social governance. However, by the time of the New Deal, socialized courts had begun a gradual period of institutionalization and de-ideologization—one that took place against the backdrop of a more developed, administrative, and nationalized welfare state.

Critics of these courts would increasingly deploy arguments about civil liberties and procedural due process to challenge the judicial discretion and procedural informality introduced by Progressives—in the courts in which such informality persisted—an effort perhaps, as Willrich suggests, to reconstruct boundaries between “criminality and dependency, welfare and policing.”<sup>152</sup> Such attacks against the individual injustices of informal proceedings culminated in the 1960s with a famous assault on the juvenile court.<sup>153</sup>

However, many other courts created during the Progressive era did not meet with such a dramatic demise. To the contrary, over the course of the 1940s and 1950s they became regularized as part of a court bureaucracy that was neither particularly informalized nor socialized. As Christine Harrington puts it, “[c]riticism of the socialized courts after 1940 focuses on the fact that they were appendages of traditional judicial institutions rather than genuine alternatives to the adversarial process.”<sup>154</sup>

This was certainly the case for the New York Women’s Court. In 1957, Chief Magistrate John Murtagh and Sara Harris (a professional writer) published a book describing a rather unexceptional criminal court.<sup>155</sup> Procedure had improved, they argued: legal-aid attorneys now represented indigent defendants and everyone was assured a speedy trial.<sup>156</sup> The court also boasted the aesthetics of judicial formalism:

[p]roceedings are conducted in an imposing mahogany-walled, many-windowed courtroom designed in the best of taste and in accordance with the finest judicial standards. The magistrate presides on a

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152. WILLRICH, *supra* note 13, at 321.

153. The juvenile court, the most enduring anti-adversarial court created by Progressives, met with a famous procedural overhaul following the Supreme Court decision, *In re Gault*, in 1967. 387 U.S. 1 (1967).

154. HARRINGTON, *supra* note 13, at 62.

155. See generally JOHN M. MURTAGH & SARA HARRIS, *CAST THE FIRST STONE* (1957).

156. *Id.* at 244.

mahogany bench in the front center. The witness chair is to his left, and counsel tables are in front of the bench.<sup>157</sup>

At the same time, however, Murtagh and Harris complained that the court remained a "revolving door" and "merely a way station between the jail and the street" where few women encountered any sort of meaningful welfare or assistance.<sup>158</sup>

In the 1950s, Murtagh's indictment of the Women's Court was motivated by a very different social understanding of prostitution than that of his Progressive-era predecessors. Rather than a *social* evil—a symbol of the commercialization and commodification of American life—he recast prostitution as private sin. "It is not the business of the State," he argued, "to intervene in the purely private sphere but to act solely as the defender of the common good. Morally evil things so far as they do not affect the common good are not the concern of the human legislator."<sup>159</sup> Murtagh thus did not call for court reform from above. To the contrary, he repeatedly lobbied New York law-reform commissioners for a measure of decriminalization. The state, he argued, should prevent open and notorious scandal rather than attempt to restrain "sins against sexual morality committed in private by responsible adults."<sup>160</sup>

In 1967, in part due to Murtagh's efforts, prostitution briefly became a violation (not a crime) with a fifteen-day maximum sentence rather than, as it had been since 1909, a form of criminal vagrancy punishable by up to three years in a reformatory.<sup>161</sup> (In 1969, it was revised into a class B misdemeanor crime with a ninety-day maximum sentence, a classification which persists until now.)<sup>162</sup> Also in 1967, the New York Women's Court closed, entirely unceremoniously, as part of a bureaucratic reorganization of criminal court administration.<sup>163</sup>

The reformist pendulum has continued to swing. Today, we have a second era of informal "socialized" courts that again include in their ambit the intensification of the prosecution and treatment of prostitution defendants. Like their predecessors, new specialized prostitution courts combine social welfare, social control, and individual responsibility, but in different and changing ways.

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157. *Id.* at 245.

158. *Id.* at 244–45.

159. *Id.* at 300 (quoting *Homosexuality, Prostitution and the Law: The Report of the Roman Catholic Advisory Committee*, DUBLIN REV., Summer 1956, at 57, 61).

160. *See id.* at 300–01; *see also* John M. Murtagh, Report on the Women's Court to Mayor of the City of New York (Feb. 14, 1955), *excerpted in* MURTAGH & HARRIS, *supra* note 155, at vi.

161. Roby, *supra* note 87, at 87–90. *See* N.Y. CRIM. PROC. LAW § 887(4) (1909) (defining "vagrant"); COBB, *supra* note 23, at 318–20 (Inferior Criminal Courts Act § 89(1)–(2)).

162. Roby, *supra* note 87, at 86–87 n.14; N.Y. PENAL LAW § 230.00 (McKinney 1969).

163. Roby, *supra* note 87, at 93 n.45.



## II. From Market Participants to Victims of Family Trauma: 1990s to Now

### A. *Problem-Solving Courts and Welfare State Retrenchment*

Compensatory efforts to reinstall informalism in criminal adjudication began as early as the 1970s in the wake of procedural due process reform, determinate sentencing, and retributive criminology.<sup>164</sup> A select group of reformers proposed experiments in “diversion,” where certain low-level offenders were supposed to receive treatment rather than punishment (constrained now by formal procedural safeguards such as transparent guidelines to justify a diversionary sentence).<sup>165</sup> But during the 1970s and 1980s, most widespread informal and anti-adversarial procedural innovation focused on civil courts—often by describing these courts as overtaxed and ineffective, and by proposing “alternatives” such as mediation.<sup>166</sup> These innovations reflected the work of a range of actors on the left, right, and center of the political spectrum who converged on the limits of adjudication to address highly contextual and individualized problems, and who argued instead for para-professional, open-ended, collaborative, and flexible processes to foster problem-solving from below.<sup>167</sup> In the 1980s, the strand of alternative dispute resolution activism that became institutionalized within American civil courts reflected the dominant economic and political sensibilities of the time: these were dispute-resolution processes designed to increase the privacy and autonomy of the individual, to rationalize and enhance the efficiency of state and federal judicial systems, and to decrease the role for the state in domestic and commercial affairs.<sup>168</sup>

It was not until the mid-1990s that the United States again witnessed a coordinated effort to transform lower criminal courts as explicit agents of social governance. Here, the uptake of informal, participatory, and decentralized procedural reform in civil courts combined with an explosion of broken-windows policing and public-order arrests to focus attention on what reformers likewise described as overtaxed and ineffective misdemeanor

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164. AUERBACH, *supra* note 13, at 121, 127.

165. *See, e.g., id.*; HARRINGTON, *supra* note 13, at 24–29; *see also* PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT*, at xiv (1978) (presenting a case study of “an alternative model of plea negotiation” where “negotiation between prosecution and defense takes on the character of a process of collaborative assessments of cases”).

166. *See, e.g.,* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 114–16 (1976).

167. For an elaboration of some of the multiple and competing strands of the early ADR movement, *see* Amy J. Cohen & Michael Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, 1091–93 (2011).

168. *See generally* Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

criminal courts.<sup>169</sup> “Every legal right of the litigants is protected, all procedures followed,” New York Chief Judge Judith Kaye complained of traditional criminal courts, “yet we aren’t making a dent in the underlying problem.”<sup>170</sup>

Proponents of problem-solving courts thus aimed to provide alternative forms of criminal adjudication that could address “chronic social, human, and legal problems”—typically by encouraging judges to convene collaborative negotiations between prosecutors, defense attorneys, and social workers that result in social service-oriented sentences.<sup>171</sup> Greg Berman and John Feinblatt, founders of the New York Center for Court Innovation (CCI)—a think tank that has spearheaded most New York problem-solving courts—put the aspiration as follows: problem-solving courts “broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the future well-being of communities.”<sup>172</sup> Litigants subject to new forms of court-administered social welfare and social control included people categorized as members of groups deserving social interventions: homeless, mentally ill, youth. They also included people who commit low-level crimes generally, such as drug possession, vandalism, forms of family dysfunction, shop-lifting, public drunkenness, and prostitution—“the everyday rights and wrongs of the great majority of an urban community” once again.<sup>173</sup>

Several scholars have thus described contemporary problem-solving courts as welfare institutions, arguing that they apply social services in troubling ways from inside criminal courts.<sup>174</sup> Many have likewise argued,

169. For the origins of broken-windows policing, see James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 29.

170. Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 13.

171. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL’Y 125, 126 (2001). In 2000, two American judicial organizations passed a resolution to “[c]all these new courts . . . ‘Problem-Solving Courts,’ . . . [because] the collaborative nature of these new efforts deserves recognition.” Conf. of Chief Justs. & Conf. of St. Ct. Admins., *CCJ Resolution 22 & COSCA Resolution IV: In Support of Problem Solving Courts* (Aug. 3, 2000), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Resolution-PSC-Aug-00.ashx> [<https://perma.cc/CY83-498P>].

172. Berman & Feinblatt, *supra* note 171, at 126. The Center for Court Innovation is “a public/private partnership between the New York State Unified Court System and the Fund for the City of New York.” It functions as a research and development branch of the court system focused on implementing diversionary, problem-solving court programs. See *Who We Are*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/who-we-are> [<https://perma.cc/ZX3U-HM7Y>]. Berman is currently the executive director of CCI. John Feinblatt is the former executive director of CCI and former Chief Advisor on criminal justice to Mayor Bloomberg.

173. ELIOT, BRANDEIS, STOREY, RODENBECK & POUND, *supra* note 14, at 29.

174. For example, writers have leveled the following criticisms at problem-solving courts—that they: individuate structural problems, see Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 425 (2009) [hereinafter Miller, *New Penology*]; Jane M. Spinak, *A*

as Richard Abel put it, that “[t]he primary business of informal institutions is social control,” expanding the reach of the state into the lives of the poor and marginalized through discourses of care.<sup>175</sup> Likely for both of these reasons, numerous scholars have compared contemporary problem-solving courts to the socialized courts of the Progressive era, especially the resurgence of informal procedure within them. Several describe Progressive-era courts as “the original problem-solving courts” and hence as “a cautionary tale” for our time.<sup>176</sup> Some scholars have even observed “uncanny parallel[s]” between problem-solving courts and the New York Women’s Court itself.<sup>177</sup> In 2006, Mae Quinn compared the Women’s Court to the Midtown Community Court—the first contemporary problem-solving court to focus on prostitution—as “a stark example of how history is repeating itself.”<sup>178</sup>

But arguments about social welfare and social control can illuminate a critical comparison of informal criminal courts over time only if we know the particular forms and purposes that such welfare and controls assume. I argue

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*Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 113, 119–24 (2010); Corey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do?*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 89, 103–04 (2010); devolve responsibility to individuals and families to manage problems under neoliberal state restructuring, see Amy J. Cohen & Ilana Gershon, *When the State Tries to See Like a Family: Cultural Pluralism and the Family Group Conference in New Zealand*, 38 POL. & LEGAL ANTHROPOLOGY REV. 9 (2015) (canvassing criticisms); undermine due process as they apply “penal-welfarist techniques upon the poor and disposed,” see Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1569 (2004); make social services contingent on arrest and legal coercion, see Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 73, 84 (2010); Gruber, Cohen & Mogulescu, *supra* note 12; Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63, 91–92 (2002); and potentially eclipse redistributivist forms of welfare not administered by criminal courts, see generally Gruber, Cohen & Mogulescu, *supra* note 12.

175. Richard Abel, *Introduction*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 1, 5 (Richard L. Abel ed., 1982); see, e.g., Burns, *supra* note 174, at 84; Casey, *supra* note 4, at 1474.

176. Casey, *supra* note 4, at 1464; see also Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515–16 (2003) (describing parallels between contemporary drug courts and early juvenile courts); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2097 (2002) (comparing problem-solving courts to “the more general rehabilitative experiment in the 1930s”); Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008) (arguing that the “rationale for today’s problem-solving courts” is “remarkably similar” to early juvenile courts).

177. Carl Baar & Freda F. Solomon, *The Role of Courts: The Two Faces of Justice*, 15 CT. MANAGER 19, 24 (2000) (describing “fascinating parallels between problem-solving court reform in the 1990s and court reform in the early twentieth century” including an “uncanny parallel” between “the community court movement in New York City and the New York City Women’s Court”); see also Quinn, *supra* note 133, at 666 (arguing that a New York problem-solving court and the New York Women’s court present “remarkable parallels”).

178. Quinn, *supra* note 133, at 697.

here that contemporary problem-solving courts in fact demonstrate how *differently* court-centered social governance was understood when it re-emerged in the 1990s against the backdrop of the administrative welfare state's decline—or perhaps rather more accurately against the backdrop of the transformation of welfarist ideas. This period witnessed the ascendancy of the idea that markets, far more than state law, can solve social problems, and that individual entrepreneurship, far more than state intervention, can optimize personal well-being.

Contemporary court reformers—seeking the betterment of defendants and their communities no less than their Progressive-era predecessors—thus brought very different governance ideas to the work of court reform. As David Garland observes, the politics of this period “put in place a quite different framework of *economic freedom and social control*.”<sup>179</sup> In the criminal justice arena, this period did not simply witness longer and increasingly punitive custodial sentences; the 1990s, in fact, also “saw a quite significant increase in the numbers of treatment programmes provided to offenders.”<sup>180</sup> But, as I shall elaborate below, whereas treatment-oriented Progressive-era courts offered programs of moral and behavioral reform to adjust deviant social behaviors that undercut an idea of a good social-moral order, problems-solving courts aspire to teach individual responsibility to cure the individual pathologies that undercut an idea of a good-ordered self<sup>181</sup>: social control as a form of enhancing individual capacity for economic freedom, so to speak.

There is by now a voluminous literature on problem-solving courts, including attention to the good deal of variation among them.<sup>182</sup> I thus briefly

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179. GARLAND, *supra* note 1, at 100.

180. *Id.* at 170.

181. See generally JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 178–80 (2001).

182. Several scholars have also observed how problem-solving courts have been increasingly institutionalized. See, e.g., Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1501 (2003). It is thus particularly surprising how little data appears to exist about their comparative presence or resources in the American criminal justice system. According to the National Center for State Courts there are roughly 14,000–16,000 (civil and criminal) courts in the United States. Janet G. Cornell, *Limited Jurisdiction Courts—Challenges, Opportunities, and Strategies for Action*, TRENDS ST. CTS., <http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/courts-and-the-community/3-6-limited-jurisdiction-courts.aspx> [https://perma.cc/R2TC-ZEWU]. According to the National Drug Court Resource Center, in 2015, there were 3,133 drug courts and in 2014 there were 1,272 other kinds of problem-solving courts in the United States and its territories. *How Many Drug Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR., <http://www.ndcrc.org/content/how-many-drug-courts-are-there> [https://perma.cc/XD2Q-YRRJ]; *How Many Problem-Solving Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR., <http://www.ndcrc.org/content/how-many-problem-solving-courts-are-there> [https://perma.cc/C84F-SUL6]. Drug courts are likely the best funded. In 1999, drug courts received \$40 million in aggregate federal funding and in 2009 they received

describe three overarching characteristics—a commitment to individual context, social control defined as individual responsibility, and systemic attention to efficiency—that shape most problem-solving courts to this day.

My aim here is threefold. First, describing these characteristics helps to illustrate how problem-solving courts differ from Progressive-era socialized courts—combining social welfare, social control, and individual responsibility in different ways and via different means. Second, I show how in the 1990s and early 2000s these characteristics influenced how problem-solving courts approached the “social problem” of prostitution in clear and decisive ways. Third, and most significantly, I argue that over the last five to eight years, prostitution has become an *exception* to this still-dominant responsibilization model. New prostitution courts, now called Human Trafficking Intervention Courts, have challenged each one of these characteristics and, in so doing, present us with a new kind of contemporary welfarist criminal court that has revived, but also transformed, earlier arguments about female dependency and state intervention.

## *B. Core Procedural Characteristics of Problem-Solving Courts*

*1. Individual Context.*—Proponents describe differentiated interventions as the hallmark of problem-solving courts: a flexible specialized approach to judging against the mass production of cases. Issa Kohler-Hausmann has persuasively argued that conventional misdemeanor courts in fact mark and sort offenders based on their contacts with the system.<sup>183</sup> Numerous professionals in conventional misdemeanor courts nonetheless profess to *feel* like they are working on an assembly line. As one judge explained: “Instead of cans of peas, you’ve got cases. You just move ’em, move ’em, move ’em.”<sup>184</sup> Against this model (or rather experience) of

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almost \$90 million. WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 5 (2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF> [https://perma.cc/7V9Q-NL7K].

Statewide Drug Court Coordinator Valerie Raine explains that in New York, because funding for courts is allocated generally among judicial districts, it is “extremely difficult” to estimate comparative funding for problem-solving courts (which also often includes grant funding that fluctuates significantly). E-mail from Valerie Raine, Esq., Statewide Drug Court Coordinator, NYS Unified Court System, to author (Sept. 29, 2015) (on file with author).

183. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 646 (2014).

184. Greg Berman, “What is a Traditional Judge Anyway?”: *Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000) (comments of Hon. Kathleen A. Blatz, Chief Justice, Supreme Court of Minnesota); see also GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 25–28 (2005) (describing how court actors experience their work as a form of “mcjustice”); JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 8–9 (2009) (describing dissatisfaction

adjudication, problem-solving courts propose to tailor interventions to the specific social and individual characteristics of the offender. Many use “computer technology to make sure that judges have access to in-depth profiles of defendants” that include recidivism rates, social histories such as drug addiction and mental illness gathered in clinical intake interviews, and potentially the information contained in service provider reports for defendants previously mandated to court social services.<sup>185</sup> Berman and Feinblatt put the aspiration as follows: “Should each of these offenders receive the same sanction? Shouldn’t judges and attorneys have the tools to respond differently in each of these cases? . . . [T]here’s no reason why justice has to be one-size-fits-all.”<sup>186</sup>

Problem-solving courts thus inherited Miner’s call for an individual method. But, as the following section suggests, the aim of such assessments is not to sort offenders based on social–moral classifications as much as to produce information about individual pathology and individual capacity for responsibility.

2. *Social Control as Individual Responsibility.*—In his extensive work on problem-solving courts, sociologist James Nolan traces a broad shift in criminal law from understanding crime in social–moral terms to individual-pathological ones where offenders are understood to suffer from a disorder that requires treatment.<sup>187</sup> This shift, Nolan argues, reflects a broader therapeutic turn within American culture,<sup>188</sup> and one that resonates with the emphasis on the self and self-reliance increasingly expressed in the 1980s and 1990s in the economy.<sup>189</sup> As such, to merit diversion to a problem-solving court, an offender must be understood not only to suffer from an individual pathology but also as someone willing to instill within himself

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among conventional-court judges); Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 209 (2009) (finding, based on a survey of 355 judges, that judges in drug and family problem-solving courts report greater satisfaction and that they were more likely to understand their role as helping litigants with their problems).

185. BERMAN & FEINBLATT, *supra* note 184, at 36.

186. *Id.* at 33.

187. See generally NOLAN, *supra* note 181, at 133–54 (Chapter Six: The Pathological Shift). As Nolan puts it: “The drug court demands a therapeutically revised form of confession: ‘I am sick’ instead of ‘I am guilty.’” *Id.* at 142.

188. *Id.* at 47.

189. See, e.g., Jackson Lears, *Afterword*, in RETHINKING THERAPEUTIC CULTURE 211, 213 (Timothy Aubry & Trysh Travis eds., 2015).

desires for self-improvement—that is, a “‘responsibilized’ and ‘accountable’ agent who is given privileged ‘opportunities’ for rehabilitation.”<sup>190</sup>

To that end, defendants—rather than subjects of state care upon whom treatment is imposed, as in Progressive-era courts—are transformed into instruments of their own recovery. Treatment mandates are thus designed not only to help stop the underlying criminal behavior but also to enhance individual responsibility and choice.<sup>191</sup> Drug courts, for example, aim not simply to achieve the cessation of drug use but to impart skills in self-management and goal achievement by purposefully monitoring whether and how defendants show up to court appearances, attend and participate in treatment programs, and cooperate with treatment staff.<sup>192</sup> Anthropologist Victoria Malkin observed similar practices in a problem-solving community court. She explains that “[f]rom the initial court appearance to the subsequent mandates, defendants are reminded that the choices they make and the subsequent consequences are theirs and theirs alone.”<sup>193</sup> From this perspective, learning to be a reformed criminal actor is not unlike learning to be a good market actor.

As a matter of institutional design, treatment interventions are also often justified in a relentlessly liberal language of autonomy and choice including the choices the offender made that resulted in a criminal charge. Bruce Winick, a pioneering theorist of problem-solving courts, explains that offenders “are in these difficult situations because of their own actions.”<sup>194</sup> They themselves choose treatment: “[T]hey were not arrested as a vehicle for forcing them into treatment, but because they possessed drugs or committed some other crime. . . . [E]xtending to them the additional option of accepting a rehabilitative alternative does not make the choice they will then face a

190. Benedikt Fischer, *‘Doing Good with a Vengeance’: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3 CRIM. JUST. 227, 236 (2003).

191. NOLAN, *supra* note 181, at 37–38 (distinguishing the therapeutic ethos applied in problem-solving courts from older theories of rehabilitation).

192. For detailed descriptions, see Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 846–48 (2000). For critical perspectives, see, for example, Miller, *New Penology*, *supra* note 174, at 425 (arguing that the drug court’s adoption of “individual self-control and self-esteem as the primary causes of drug crime and relapse . . . plac[es] the onus on individuals to alter their conduct”); Frank Siroitch, *Reconfiguring Crime Control and Criminal Justice: Governmentality and Problem-Solving Courts*, 55 U. NEW BRUNSWICK L.J. 11, 24 (2006) (“Individuals before problem-solving courts are taught to become responsible subjects by techniques of self . . . that emphasize individual agency and autonomy. Thus a form of regulation is engendered in which the offender is enlisted in the process of his or her own control.”).

193. Victoria Malkin, *The End of Welfare as We Know It: What Happens When the Judge is in Charge*, 25 CRITIQUE ANTHROPOLOGY 361, 380 (2005).

194. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1074 (2003).

coercive one.”<sup>195</sup> Berman and Feinblatt likewise stress the consent-based nature of treatment. Indeed, they analogize defendants to consumers who can choose among, and thus influence, the market for sentencing options. “[P]roblem-solving courts must have a finely attuned sense of the local legal marketplace,” they explain, “to make sure that the deal they are offering defendants is reasonable enough to provide an incentive to participate.”<sup>196</sup> On this view, treatment is a choice that enhances, rather than constrains, offender autonomy and hence responsibility.

3. *Efficiency and Measurable Effects.*—Finally, problem-solving courts adopt effectiveness and economic efficiency as core principles of court reform and strive to demonstrate these principles through “measurable goals.”<sup>197</sup> As CCI explains, problem-solving courts “cost money”; the benefits of providing social services and community restitution must therefore be “enough to offset the expense.”<sup>198</sup> For drug courts, common measures include recidivism rates and retention in mandated treatment programs.<sup>199</sup> For community courts, measures of success include “drops in crime rates, reductions in arrest-to-arraignment processing times, improved community service compliance rates, and community service labor contributed to the community” as well as harder to measure positive effects on economic development.<sup>200</sup> Here, judicial attention to the individual offender combines with a practice of data collection and quantifiable performance standards so that the effects of problem-solving courts on criminal behavior can be understood and monitored in aggregate statistical terms. For Berman and Feinblatt, measuring concrete costs and benefits in a transparent and economic fashion itself sets problem-solving courts apart from Progressive-era ones.<sup>201</sup>

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195. *Id.*

196. BERMAN & FEINBLATT, *supra* note 185, at 176.

197. *Id.* at 57.

198. JOHN FEINBLATT ET AL., CTR. FOR COURT INNOVATION, NEIGHBORHOOD JUSTICE: LESSONS FROM THE MIDTOWN COMMUNITY COURT 12–13 (1998).

199. For examples, see MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS, AND IMPACTS 85–88, 111 (2003); STEVEN BELENKO, THE NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 51–52 (2001). See also Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma’am: What We Know and Don’t Know About Problem-Solving Courts*, 30 FORDHAM URB. L.J. 1027, 1031–33 (2003) (measuring court success via increased retention rates in mandatory treatment programs, decreased recidivism rates, and cost savings compared to traditional adjudication, among other factors).

200. FEINBLATT ET AL., *supra* note 198, at 13.

201. BERMAN & FEINBLATT, *supra* note 185, at 57.



To conclude this subpart, problem-solving courts as they developed in the 1990s reflect and reinforce the larger ethos of personal responsibility and efficiency that was then transforming the administration of welfare more broadly. As numerous scholars have observed, during this period social service provision (if not the idea of the social good itself) became defined through ideas of self-empowerment, self-sufficiency, and individual participation and responsibility.<sup>202</sup> In 1996, for example, the federal government dismantled the primary means-tested welfare program (Aid to Dependent Families with Children) that provided cash aid to families that met income qualifications and replaced it with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)—what commentators widely describe as workfare rather than welfare.<sup>203</sup> Welfare became not an entitlement but rather a contractual relationship: recipients receive benefits in exchange for working as well as in exchange for meeting other obligations such as “work tests” and “individual responsibility plan[s]” designed to impart the skills and habits of good market actors.<sup>204</sup> Individuals who fail to comply face reduced benefits and penalties. Indeed, as Kaaryn Gustafson explains, “[t]he new welfare policies threatened that those who failed to play by the rules—by meeting mandatory work requirements, by abiding by behavior reforms, and by reporting all details of income and household composition—would be harshly punished with new penalties.”<sup>205</sup>

Problem-solving courts exemplify this logic. The services and benefits these courts provide are based on a particular set of social controls: an individual’s responsibility to use his own resources to manage risk and engage in self-improvement rather than the state’s obligation to meet social needs, and they combine incentives for state services with sanctions and punishments. As I illustrate in the following subpart, in the 1990s and early 2000s these ideas clearly influenced how New York problem-solving courts sought to represent and manage prostitution.

### C. *Prostitution in the Midtown Community Court*

In the 1990s, when court reformers again created specialized court programs to prosecute prostitution defendants, the social context for selling

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202. See generally Malkin, *supra* note 193, at 368; BARBARA CRUIKSHANK, *THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS* (1999); Nikolas Rose, *The Death of the Social? Re-figuring the Territory of Government*, 25 *ECON. & SOC’Y* 327 (1996).

203. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601–17, 619 (2012)).

204. See AMIR PAZ-FUCHS, *WELFARE TO WORK: CONDITIONAL RIGHTS IN SOCIAL POLICY* 58–59, 107–08, 120–22 (2008).

205. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. CRIM. L. & CRIMINOLOGY* 643, 661 (2009); see also Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *YALE J.L. & FEMINISM* 317, 357–62 (2014).

sex had dramatically changed. Moral panic about big business, organized commerce, and sex trafficking had disappeared—or at least it had disappeared from the concerns of court reformers in New York. Court reformers described decentralized, mostly spot, street prostitution markets.<sup>206</sup> They argued that the primary problem with these markets was not that they victimized women or mimicked the most troubling aspects of unregulated capitalism in the underground economy, but rather that they happened on the streets in all-too-obvious ways harming *other*, more desirable markets—that is, prostitution as a form of social disorder undermining the commercial viability, safety, and “community” of New York City.<sup>207</sup>

To be sure, in the 1970s and 1980s radical feminists had revived a moral assault on pornography and prostitution that included arguments that prostitution was a form of sexual slavery.<sup>208</sup> But as far as I can discover, such arguments failed entirely to influence early problem-solving prostitution diversionary court programs. As Gruber and I elaborate elsewhere, in a highwater moment of broken-windows policing, prostitution appeared akin simply to other “quality of life” offenses in New York City problem-solving courts—in turn laying the ground for the victim-based critique that would follow.<sup>209</sup>

In this subpart, I describe how the first problem-solving court to address prostitution proposed to operate as a welfarist institution. In 1993, CCI launched the Midtown Community Court (MCC) in Manhattan and charged judges with tailoring interventions based on a range of personal information about defendants including recidivism rates but also data “gathered by pre-arraignment interviewers.”<sup>210</sup> Judges were supposed to use this information

206. Robert Victor Wolf, *New Strategies for an Old Profession: A Court and a Community Combat a Streetwalking Epidemic*, 22 JUST. SYS. J. 347, 348–49 (2001); Sviridoff et al., *supra* note 6, at 4.1.

207. See, e.g., ROBERT V. WOLF, CTR. FOR COURT INNOVATION, *DEFINING THE PROBLEM: USING DATA TO PLAN A COMMUNITY JUSTICE PROJECT 3* (1999).

208. This assault split second-wave feminists into two camps: those who saw the selling of sex as uniquely and intrinsically oppressive of women (a form of slavery under patriarchy), see generally KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979) and CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989), and those who argued for its destigmatization as a form of work, attentive however to labor abuses and calling for class- and race-based analysis of the sex industry, for example, Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION* 34, 37–40 (Kamala Kempadoo & Jo Doezema eds., 1998). For more detail, see Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1351–54); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 307–14 (1995); Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1418–39 (2011).

209. Cohen & Gruber, *supra* note 9.

210. DAVID C. ANDERSON, U.S. DEP’T OF JUSTICE, IN NEW YORK CITY, A “COMMUNITY COURT” AND A NEW LEGAL CULTURE 8 (1996).

to “assess[] how defendants will handle community service assignments and what social programs they might need.”<sup>211</sup> To that end, the MCC boasted “an array of professional helpers on-site—counselors, educators, nurses, job trainers, and drug-treatment providers . . . to address the problems—addiction, homelessness, unemployment—that are often associated with criminal behavior.”<sup>212</sup> Even more, Berman and Feinblatt emphasized that the MCC took “special pains to create social service interventions targeted to the unique issues of prostitutes, many of whom suffer from drug abuse, domestic violence, low self-esteem, and other chronic problems.”<sup>213</sup>

“Social service interventions,” however, followed a particular temporal logic. Despite the MCC’s commitment to individual investigation, most prostitution defendants were cast generally as self-interested market actors (albeit market actors with an array of individual problems). As such, social controls took two basic forms. First, reformers used informal, discretionary court procedure to craft alternative market incentives—namely, court mandates designed to make it harder for defendants to turn a profit at work.<sup>214</sup> In particular, the MCC scheduled community-service sentences (which included tasks like cleaning toilets or stuffing envelopes)<sup>215</sup> during evening or night-time hours, not only to provide “restitution to the community” but also to “put a strain on prostitutes’ ‘work’ schedules” and, as a result, to “reduce[] their income.”<sup>216</sup> Indeed, court researchers reasoned these alternative sanctions made it “more difficult for prostitutes and would-be customers to make transactions. This decline in the number of potential customers in turn resulted in depressed prices for sex acts, and diminished incomes for prostitutes.”<sup>217</sup> To be sure, all penal deterrence strategies aim to make the costs outweigh the benefits of crime, but in this case the MCC deployed rather literal economic logics.

Second, at the same time as they worked to make prostitution less remunerative, reformers designed treatment programs to teach prostitution defendants market-oriented skills like risk assessment and personal responsibility. In the MCC, first-time offenders were sentenced to “a session of health education—part of the court’s efforts to make prostitutes face up to the dangers and risks of their lifestyle.”<sup>218</sup> In the Red Hook Community Court in Brooklyn (also piloted by CCI), Malkin described health classes to

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211. *Id.*

212. BERMAN & FEINBLATT, *supra* note 185, at 63.

213. *Id.* at 64.

214. See Sviridoff et al., *supra* note 6, at 4.29.

215. Wolf, *supra* note 206, at 355.

216. Sviridoff et al., *supra* note 6, at 4.29.

217. *Id.*

218. BERMAN & FEINBLATT, *supra* note 185, at 93.

teach prostitution defendants about STDs and the risks of not using condoms.<sup>219</sup> As Berman and Feinblatt explained of these mandates more generally, they were designed to help prostitution defendants “understand the long-term risks of their behavior” as well as to make resources available for those particular defendants who were “willing to make a commitment to get off the streets.”<sup>220</sup> Other court researchers similarly described services for prostitutes focused “on building self-esteem, goal setting and planning for the future.”<sup>221</sup> Indeed, Berman and Feinblatt featured the recollections of one MCC defendant who described how her social worker counseled her: “You’re so much better than this. Do you want to finish college? . . . You’re not going to be pretty forever. You’ve got your son to think about.”<sup>222</sup>

Most prostitution defendants thus received community service coupled with counseling and pedagogy designed to teach skills in risk assessment, personal responsibility, and self-improvement.<sup>223</sup> But offenders could face incarceration if they did not complete their service mandates.<sup>224</sup> Recidivists faced incarceration as well; if a computer screen placed before the judge flashed “persistent misdemeanor” (anyone with four or more convictions in the MCC), a prostitution defendant could receive a jail sentence, typically longer than she would receive in a conventional court.<sup>225</sup>

Finally, CCI devoted significant resources to measuring effects in a language that was predominantly efficiency driven. In an extensive investigation, a group of seven court researchers, Michele Sviridoff et al., reported that over a year and a half, prostitution arrests declined by 56%.<sup>226</sup>

219. Malkin, *supra* note 193, at 381–82; *see also* THE URBAN JUSTICE CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 75 (2003), <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> [https://perma.cc/J6UR-BXTQ] (quoting a representative from a New York District Attorney’s office describing a similar program with “training for women on self-respect, drug rehab, [and] health issues including HIV and other STDs”).

220. BERMAN & FEINBLATT, *supra* note 185, at 64.

221. ERIC LEE & JIMENA MARTINEZ, CTR. FOR COURT INNOVATION, HOW IT WORKS: A SUMMARY OF CASE FLOW AND INTERVENTIONS AT THE MIDTOWN COMMUNITY COURT 5 (1998).

222. BERMAN & FEINBLATT, *supra* note 185, at 134.

223. In the first 18 months, the MCC sentenced 95% of prostitution defendants to community and/or social services compared to only 25% in the conventional criminal court downtown. Sviridoff et al., *supra* note 6, at 1.9.

224. *Id.* at 3.7 n.4 (reporting that of prostitution defendants sentenced to community service, 52% of those that did not complete their service mandates were sentenced to jail).

225. BERMAN & FEINBLATT, *supra* note 185, at 93–94 (describing a case of a recidivist offender who received thirty days in jail; the Judge explains, “[W]hen I’ve been trying to help them and they keep prostituting, I have no problem putting them in jail”). According to Sviridoff et al., “the Midtown Court handed out a smaller proportion of jail sentences than Downtown, but jail sentences at Midtown were three times as long (fifteen days compared to five days).” Sviridoff et al., *supra* note 6, at 4.3–4.4.

226. Sviridoff et al., *supra* note 6, at 1.10. Arrests declined even further over the following eighteen months. *Id.* at 4.30.

They argued this decline was at least one-third attributable to the court.<sup>227</sup> According to their interview data, many defendants had decided that “it had become too difficult to work two jobs—on the streets and at the courthouse.”<sup>228</sup> In response, some left Manhattan to work in boroughs without a problem-solving court, others moved indoors or tried to serve only regular customers, and some small number stopped working altogether.<sup>229</sup> “As a result,” the authors concluded, “markets—and the potential to make money—were shrinking.”<sup>230</sup>

CCI tried to quantify this impact. MCC’s approach was “resource-intensive,” Berman and Feinblatt conceded, but it was offset by cost savings to the court system and improvements to community life.<sup>231</sup> Financial savings stemmed primarily from fewer arrest and arraignments (which cost about \$1,000 per person) and secondarily from reduced jail costs.<sup>232</sup> (Reduced jail costs were not terribly significant because conventional courts did not incarcerate at high rates and because “‘secondary’ jail sentences”—sentences for defendants who failed to complete service mandates—increased in the MCC.)<sup>233</sup> Benefits to the “community,” however, potentially included “multiplier effects” such as “changes in property value and rents for residential, retail, and office uses; changes in patterns of people and business moving into and out of the Court’s catchment area; or change in the frequency of police calls for service about Midtown quality-of-life problems.”<sup>234</sup>

227. Other potential causal factors included changes in policing and changes in street drug markets that also depressed street prostitution markets. *Id.* at 2.30, 4.4, 4.30 n.29.

228. *Id.* at 1.11.

229. *Id.* at 4.23, 4.29.

230. *Id.* at 4.4 (emphasis added).

231. BERMAN & FEINBLATT, *supra* note 184, at 64. They write:

There is no denying that this approach is resource-intensive: the Midtown Community Court is home to a range of on-site services that simply don’t exist in most criminal courts. Some government and nonprofit service providers agree to place staff at the court at no extra cost, recognizing that the Court can guarantee them thousands of clients each year. In other cases, the Court must pay for additional services to meet the needs of its defendants. In the project’s first three years, these additional costs were born[e] primarily by private funders. At the end of this “demonstration” period, local government assumed these costs, convinced by Midtown’s results that it was an investment worth making.

*Id.*

232. Sviridoff et al., *supra* note 6, at 4.30 n.29 (“Given a conservative estimate of \$1,000 per case in arrest-to-arraignment expenditures, a net reduction of 1,500 arrests results in a system savings of \$1.5 million.”). The authors proceed to argue that it is reasonable to attribute a third of these savings to the work of the MCC. *Id.*

233. *Id.* at 3.5–10. The authors explain that for prostitution (and some other crimes) “[p]rimary jail savings . . . were comparatively small and the costs associated with an increased likelihood of secondary jail eradicated primary jail savings.” *Id.* at 3.10.

234. *Id.* at 1.3, 1.18.

As Garland observes, over the past several decades, welfare practices in criminal courts have become “more conditional, more offence-centred, more risk conscious,” presenting offenders who are subject to a “welfare mode” of criminal adjudication (such as treatment and probation) less as “socially deprived citizens” or as clients “in need of support” than as “risks who must be managed” and measured.<sup>235</sup> As we have seen, Garland’s description aptly characterizes the MCC.

That is, until very recently. In 2012, CCI published a report describing prostitution defendants in the MCC precisely as *clients* with *social service needs* because they experience *trauma*.<sup>236</sup> Intriguingly, however, the report elides the court’s own transformation. “Street prostitution,” it begins, “was a significant problem in Midtown Manhattan when the Midtown Community Court opened in 1993.”<sup>237</sup> But rather than describe roughly fifteen years of responsabilizing interventions, the report instead proceeds to argue that “[t]he court quickly recognized that people arrested for prostitution had all kinds of social service needs, which included drug treatment, employment services, and housing. In response, staff . . . screen each client, looking for histories of trafficking and underlying trauma and then connecting participants to appropriate services.”<sup>238</sup>

Chief of Policy and Planning, Judge Judy Harris Kluger, proposed a similar elision. She argued before the New York City Council that the HTICs—of which the MCC is now one—reflect “nothing new,” only the “theory behind [New York’s] successful problem-solving courts.”<sup>239</sup> But as the following subparts suggest, compared to virtually all other problem-solving court interventions, the New York City HTICs in fact embody a qualitatively different reformist orientation—specifically one that challenges dominant contemporary welfarist ideas of personal responsibility and efficiency.

#### D. *Making Sex Trafficking into Domestic Trauma*

In October 2013, when Chief Judge Jonathan Lippman announced the statewide roll-out of the new Human Trafficking Intervention Courts, he

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235. GARLAND, *supra* note 1, at 175.

236. SARAH SCHWEIG, DANIELLE MALANGONE & MIRIAM GOODMAN, CTR. FOR COURT INNOVATION, PROSTITUTION DIVERSION PROGRAMS 4 (2012).

237. *Id.*

238. *Id.* (emphasis added; internal quotations omitted).

239. *How Do the Human Trafficking Intervention Courts Address the Needs of New York City’s Runaway and Homeless Youth Population?: Oversight Hearing Before the Comm. on Youth Servs.*, New York City Council 11–12 (Dec. 12, 2013) [hereinafter *Council Hearing 12/12/13*] (statement of Judge Judy Kluger). In the 1990s, Kluger herself served as an MCC judge, but none of her current rhetoric about female victimization appears present at that time (at least none that I can uncover). She has declined to speak with me.

explained that appropriate cases involving a prostitution-related offense would be heard by “a presiding judge who is trained and knowledgeable in the dynamics of sex trafficking and the support services available to victims.”<sup>240</sup> (Anyone charged with buying sex or trafficking sex was ineligible.) He commended the work of several actors and organizations for creating these new courts. These included prominent prostitution-abolitionist feminists—that is, feminists committed to the idea that all sex work is coerced and should be abolished—including Judge Kluger who developed HTIC practice protocols, as well as staff at the abolitionist organization Sanctuary for Families (where Kluger is now the executive director) such as advocates Lori Cohen and Dorchon Leidholdt. He also thanked CCI, the Judicial Committee on Women in the Courts, particularly for its publication of the 2013 *Lawyer’s Manual on Human Trafficking*, and “judicial pioneers” Fernando Camacho and Toko Serita.<sup>241</sup> Because all politics are local, I describe the creation of the New York City HTICs primarily through the advocacy and reform efforts of these particular actors and organizations.

Here, as previously, I describe the views of only legal and policy elites involved in New York City court reform and not the prostitution defendants arrested by the New York Police Department. Again, I do so because I am interested in tracing how the rhetorics of criminal court reform and public welfare administration have changed over time in analogous ways. But I should add nonetheless that the defendants processed through the HTICs comprise a particular slice of the people who sell sex in New York City.<sup>242</sup> The majority are poor women of color,<sup>243</sup> and their lives, I would venture, are

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240. Jonathan Lippman, *Announcement of New York’s Human Trafficking Intervention Initiative*, CTR. CT. INNOVATION (Sept. 25, 2013), <http://www.courtinnovation.org/research/announcement-new-yorks-human-trafficking-intervention-initiative> [https://perma.cc/PT5P-GGJ5].

241. *Id.*

242. For a classic account of the diversity and market stratification among sellers of sex (in San Francisco in the late 1990s), see generally Elizabeth Bernstein, *What’s Wrong with Prostitution? What’s Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN’S L.J. 91 (1999). Ronald Weitzer recently reviewed several micro-level studies of sex and labor trafficking and likewise argued that there is a great deal of lived variation—“from extreme physical and psychological abuse, severe economic exploitation, and terrible working conditions . . . to fully consensual and collaborative agreements”—that characterizes relationships that may be legally defined as trafficking in different countries. Ronald Weitzer, *Human Trafficking and Contemporary Slavery*, 41 ANN. REV. SOC. 223, 239 (2015).

243. See Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1336 n.14) (citations omitted). We explain that:

From 2010 to 2014, 87.4% of the individuals arrested in New York City for Prostitution, P.L. § 230.00, or Loitering for the Purpose of Engaging in a Prostitution Offense, P.L. § 240.37, the two charges that merit inclusion in the HTICs, were identified by the arresting agency as Black, Hispanic or Asian. . . . In that same period, 79.9% were identified as female. . . . However, the gender assigned by the arresting agency does not always comport with an individual’s actual gender identity. . . . This

invariably constrained by a complex intersection of economic, social, and family conditions.<sup>244</sup>

So how did these actors and organizations make the case for a new kind of problem-solving court? Gruber, Mogulescu, and I have previously argued that the HTICs emerged in the context of a number of recent changes in the political and legal environment.<sup>245</sup> These changes include a highly publicized international campaign against sex trafficking that often aimed to conflate sex trafficking with all forms of transnational and domestic prostitution, in part by drawing on a (complex) paradigm of coercive control articulated by domestic violence advocates.<sup>246</sup> They also include a partial turn away from broken-windows quality-of-life policing in response to criticisms of mass incarceration<sup>247</sup>—even as, or precisely because, lawmakers have simultaneously promised to intensify the prosecution of violent offenders, here, traffickers.<sup>248</sup>

To only briefly summarize some of these shifts here, in the late 1990s and early 2000s an international movement launched an extensive campaign against international sex trafficking, often in foreign locations where it was easier for advocates to imagine and describe a complete and essentialized victim.<sup>249</sup> This campaign was spearheaded by many Western feminists, but unlike the domestic sex wars of the 1970s and 1980s, it was increasingly articulated in the language of human rights.<sup>250</sup> These efforts produced

percentage would be significantly higher were transgender women identified as female rather than male in arrest data.

244. See, e.g., Amy J. Cohen & Aya Gruber, *An Accidental Governance Feminist: An Interview with Kate Mogulescu*, in *GOVERNANCE FEMINISM: A HANDBOOK*, *supra* note 9. Mogulescu, as founder and supervising attorney of the Exploitation Intervention Project at the Legal Aid Society of New York, describes a constellation of economic and social challenges that her clients face.

245. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1339–56).

246. *Id.* (manuscript at 1348–56).

247. New York City recently enacted the Criminal Justice Reform Act, which offers alternatives to criminal penalties for “broken-window” offenses such as public urination, open alcohol containers in public, and excessive noise. Criminal Justice Reform Act N.Y.C., N.Y. (June 13, 2016); *Mayor de Blasio Signs the Criminal Justice Reform Act*, NYC (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act> [<https://perma.cc/39LH-FT5V>].

248. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1386–88); see also *infra* note 260.

249. See Mariana Valverde, *The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks*, 4 U.C. IRVINE L. REV. 325, 332–33 (2014).

250. For an overview, see, for example, Prabha Kotiswaran, *Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law*, 4 U.C. IRVINE L. REV. 353, 356–57 (2014). See also Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 289 (2011).



significant institutional effects: in 2000, a U.N. protocol<sup>251</sup> and federal anti-trafficking legislation in the United States,<sup>252</sup> and in 2007, an anti-trafficking law in New York.<sup>253</sup>

But it was not simply this explosion of international anti-sex-trafficking activism—repatriated home—that shaped the HTICs as new kinds of problem-solving courts. It was also, I will suggest, the highly specific ways in which advocates described sex trafficking as—quite literally—*a form of family violence* that persuaded lawmakers and court administrators that “[w]omen who are arrested for prostitution in the Bronx are not, in fact, prostitutes. They are victims of sex trafficking” in need of trauma-informed care.<sup>254</sup>

In particular, advocates encouraged policy makers to consider that much trafficking happens at a family-sized criminal scale. Rather than picture “an organized crime ring,” the *Lawyer’s Manual on Human Trafficking*, for example, instructs readers to think of “[a] family business” or “‘Mom and Pop’ trafficking operations.”<sup>255</sup> Advocates argued further that such operations recreate the structure of abusive families (of various kinds) as a technique of control. As Liedholdt explained:

The trafficker positions himself as the head of the household, the paterfamilias who is in charge of the other family members, who take the roles of subordinate wife and children. These roles are reinforced by the traffickers’ terminology: Victims are instructed to call their pimps “Daddy” and their fellow victims “wife-in-laws.” Asian trafficking victims are often instructed to refer to their traffickers respectfully as “older brother” or “older sister.” Violence and verbal abuse are justified as the patriarch’s prerogative, indeed his duty, to discipline a disobedient spouse and unruly children. Not only do traffickers frequently make their victims their lovers, showering on them all of the trappings of romantic seduction, in a number of

251. G.A. Res. 55/25 (II), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

252. *E.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 101–13, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–13 (2012)).

253. 2007 N.Y. Laws 2753 § 2 (codified at N.Y. PENAL LAW § 230.34 (McKinney 2008)).

254. *Combatting Sexual Exploitation in NYC: Examining Available Social Services: Oversight Hearing Before the Comm. on Women’s Issues and Comm. on Gen. Welfare*, New York City Council 2 (June 27, 2011) [hereinafter *Council Hearing 6/27/11*] (written statement of Sarah Dolan, Advocate Counselor, Sanctuary for Families).

255. Dorchen A. Leidholdt & Katherine P. Scully, *Defining and Identifying Human Trafficking*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR TRAFFICKING VICTIMS* 27, 38 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013).

instances they have been known to marry their victims in order to cement their control.<sup>256</sup>

From this perspective, prostitution, sex trafficking, and family violence are all shaped by indistinguishable logics. As Lori Cohen put it: “[T]he ways in which pimps exercise power and control over prostituted victims are often identical to the ways in which batterers control their intimate partners.”<sup>257</sup> Women stay in abusive situations because of affective ties, and abused women, in turn, become vulnerable to prostitution as an “extreme” form of intimate-partner abuse and control.<sup>258</sup> Or, as Judge Kluger elaborated, “Similar to victims of other forms of domestic violence, trafficking victims often experience the same power and control, manipulation and cyclical violence that leads them to believe that their abusers love, protect and provide for them.”<sup>259</sup>

Thus whereas Progressive-era vice reformers argued for expansive understandings of sex trafficking based on the scale and degree of impersonal and anonymous business organization and capitalist exploitation, contemporary anti-trafficking advocates emphasize the degree of affective, intimate, and psychological influence. They do so specifically by building on the work of domestic violence legal reformers who reject “an understanding of domestic violence based on discrete violent acts” and likewise arguing for a legal definition of sex trafficking based on “perpetrators’ on-going tactics of power and control, *many nonphysical and not overtly violent*.”<sup>260</sup>

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256. Dorchon A. Leidholdt, *Human Trafficking and Domestic Violence: A Primer for Judges*, JUDGES’ J., Winter 2013, at 16, 21.

257. *Council Hearing 6/27/11*, *supra* note 254, at 105 (statement of Lori Cohen, Senior Staff Attorney, Sanctuary for Families); *see also Hearing Before the Comm. on Women’s Issues*, New York City Council 133–34 (Apr. 25, 2012) [hereinafter *Council Hearing 4/25/12*] (statement of Dorchon Leidholdt, Director of Center for Battered Women’s Legal Services at Sanctuary for Families).

258. *See, e.g., Council Hearing 12/12/13*, *supra* note 239, at 12 (statement of Judge Judy Kluger) (“As our knowledge and understanding of domestic violence has grown, we have come to recognize that human sex trafficking is possibly its most extreme form.”); Amanda Norejko, *Representing Adult Trafficking Victims in Family Offense, Custody, and Abuse/Neglect Cases*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR TRAFFICKING VICTIMS*, *supra* note 255, at 193, 193 (“Many victims are recruited into commercial sexual exploitation by a husband or boyfriend, who acts as the victim’s pimp. This form of trafficking is a subset of domestic violence, as the tactics used to maintain control over intimate partners are frequently taken to extremes to compel victims into prostitution.”); Amy Barasch & Barbara C. Kryszko, *The Nexus Between Domestic Violence and Trafficking for Commercial Sexual Exploitation*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR TRAFFICKING VICTIMS*, *supra* note 255, at 83, 85 (“While the tactics of batterers and traffickers are similar, the power and control used over trafficking victims are often more extreme.”).

259. *Council Hearing 12/12/13*, *supra* note 239, at 14–15 (statement of Judge Judy Kluger).

260. Leidholdt & Scully, *supra* note 255, at 29 (emphasis added). In response to such arguments, the New York legislature recently reclassified sex trafficking from a class B felony to a

This discursive emphasis on individual and intimate forms of influence penetrated policy making. For example, in a 2006 New York City council meeting debating state anti-trafficking legislation, some councilmembers explicitly distinguished individual pimps from people who were *actually* traffickers. As one argued, “the pimps are small time to me. The traffickers are the ones who have enough money to get a boat and bring over at least 100 young ladies from other countries, and bring them here.”<sup>261</sup> In 2011, by contrast, councilmembers invoked intimate partners, not organized crime, to describe the problem of trafficking against free trade. For example, one explained, “many people from a libertarian perspective, take a perspective ‘Oh, it’s free trade . . . ,’ but the reality is, it’s not free trade, right? If . . . someone has an 18 year old boyfriend and they’re being forced into it.”<sup>262</sup> Or a prosecutor explained how she had newly come to understand many cases of trafficking as reflecting intimate forms of vulnerability: “It’s like, if you love me you’d do this.”<sup>263</sup>

This new emphasis on intimate forms of violence and control also meant that new institutions were recruited into anti-trafficking projects.<sup>264</sup> For example, New York City Family Justice Centers, a city initiative to combat domestic violence, now train all their staff “to recognize signs of trafficking,”<sup>265</sup> the Manhattan District Attorney’s Office trains all assistant D.A.s who prosecute domestic violence to look for signs of trafficking when

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class B violent felony (the category of first degree rape) even when commercial sex is induced without physical compulsion. See Trafficking Victims Protection and Justice Act (TVPJA), 2015 N.Y. Sess. Laws ch. 368 (McKinney). The Act was passed by the New York State Legislature in March 2015 and was signed into law by New York’s Governor in October of 2015. *Assembly Bill A506*, N.Y. ST. SENATE (2015), <https://www.nysenate.gov/legislation/bills/2015/a506> [<https://perma.cc/Y6E6-FSXV>].

261. *Resolution Calling Upon the State of New York to Recognize that Human Trafficking is a Crime: Hearing Before the Comm. on Women’s Issues*, New York City Council 69 (Sept. 28, 2006) [hereinafter *Council Hearing 9/28/06*] (statement of Councilmember Darlene Mealy). In response, New York State Assemblyman William Scarborough, a cosponsor of what would soon be New York’s anti-trafficking law, explained his view that the law should not distinguish between these two “equally heinous” crimes. *Id.* at 69–70.

262. *Oversight: Combatting Sex Trafficking in NYC: Examining Law Enforcement Efforts—Prevention and Prosecution: Oversight Hearing Before Comms. on Pub. Safety and Women’s Issues*, New York City Council 127 (Oct. 19, 2011) [hereinafter *Council Hearing 10/19/11*] (statement of Councilmember David Greenfield).

263. Interview with Kimberly A. Affronti, Deputy Bureau Chief, Queens Cty. Dist. Attorney’s Office, in Queens, N.Y. (June 24, 2014) (joint interview) (on file with author).

264. See, e.g., Barasch & Kryszko, *supra* note 258, at 83–90 (arguing that “[d]omestic violence providers . . . are uniquely positioned to extend their missions to include assisting trafficking victims”).

265. *Council Hearing 6/27/11*, *supra* note 254, at 35–36, 43 (statement of Alexandra Patino, Executive Director, New York City Family Justice Center in Queens).

they are prosecuting domestic violence cases,<sup>266</sup> and the New York Human Resources Administration Office now screens job seekers for trafficking signs alongside signs of domestic violence.<sup>267</sup>

Or to put this all another way, by domesticating international sex trafficking—in *both* senses of the word—anti-trafficking advocates transformed the rhetorical and institutional landscape available to court reformers. As the following subpart explores, it was precisely from within this landscape of intimate-partner violence and family trauma that a new breed of court reformers emerged.

### *E. Family Trauma and Court Reform*

Nearly all accounts of the HTICs begin with the pioneering work of Judge Fernando Camacho who used trauma-based theories of domestic violence to change how he adjudicated prostitution cases. He explained that he witnessed a tremendous amount of “dissociation” among prostitution defendants in his courtroom—a term trauma professionals use to describe how victims may disconnect from painful experiences in the past or present.<sup>268</sup> As such, in 2002, he began to offer service-based dispositions alongside “patience and compassion.”<sup>269</sup> His colleagues, he explained, treated prostitution defendants as criminal market actors, that is, as people who “want to be out there, enjoy what they are doing, [and] like making the money,” and therefore need “a few days in jail to clean up the streets” or perhaps a few classes where “someone lectures about how awful prostitution is.”<sup>270</sup> By contrast, Camacho learned to think instead “from a domestic violence area, understanding why victims act in certain ways, and how batterers are able to control their victim’s behavior . . . [and] why these people had no ability to just get up and walk away.”<sup>271</sup> From Camacho’s perspective, a prostitution defendant needed a court that could act like a compassionate parent or a functional family would. In his words: “[S]he needed someone to show her someone cared about what she was doing with

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266. *Council Hearing 4/25/12*, *supra* note 257, at 62 (statement of Karen Friedman-Agnifilo, Executive Assistant District Attorney, Manhattan District Attorney’s Office).

267. *Council Hearing 6/27/11*, *supra* note 254, at 76–79 (statement of Marie B. Phillip, Executive Director, Office of Domestic Violence, Designated Human Trafficking Liaison, Human Resources Administration).

268. *See, e.g.*, Katherine M. Iverson et al., *Predictors of Intimate Partner Violence Revictimization: The Relative Impact of Distinct PTSD Symptoms, Dissociation, and Coping Strategies*, 26 J. TRAUMATIC STRESS 102, 103 (2013); David A. Sandberg et al., *Dissociation, Posttraumatic Symptomatology, and Sexual Revictimization: A Prospective Examination of Mediator and Moderator Effects*, 12 J. TRAUMATIC STRESS 127, 129 (1999).

269. Interview with Fernando Camacho, Court of Claims Judge and Acting Supreme Court Justice, Suffolk Cty. Court of Claims, N.Y. (Dec. 17, 2014) (joint interview) (on file with author).

270. *Id.*

271. *Id.*

her life, was upset with her when she did bad and praised her when she did something positive.”<sup>272</sup>

Camacho operated largely on his own in Queens until 2008, when CCI began to develop a similar view that it institutionalized explicitly around family, intimate-partner, and childhood trauma. New staff members Courtney Bryan and Robyn Mazur had previously defended battered women in the civil and criminal justice system.<sup>273</sup> Battered Women’s Syndrome is a trauma-based theory that posits that women who experience domestic violence develop a form of post-traumatic stress disorder (PTSD) that includes learned helplessness.<sup>274</sup> Just as advocates use this idea to defend women who harm their batterers, Bryan and Mazur proposed to extend this violence–trauma nexus to a broader swath of criminal defendants with histories of gender-based, domestic, or childhood abuse. In 2010, they received a grant from the Department of Justice’s Office of Violence Against Women that focused generally on victims of domestic violence and sexual assault. They used the grant to, among other things, change how the MCC provided services to women arrested for prostitution “because at that time,” Bryan explained, “the judicial response to prostitution was not centered around the recognition that many of the [defendants] . . . have histories of and may be current[ly] [subjected to] gender-based violence.”<sup>275</sup> The overarching focus of the grant and the subsequent programming was not yet singularly sex trafficking, Bryan explained. What united new efforts to advocate for victims of domestic violence, childhood sexual assault, and sex trafficking in the criminal justice system was trauma.<sup>276</sup>

In 2010, CCI hired a social worker, Miriam Goodman, trained in trauma theory to revamp how the MCC provided services to prostitution defendants. Goodman credits as a foundational influence for the pilot project Judith Herman’s *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror*—a text that reads domestic violence

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272. Amy Muslim et al., Ctr. for Court Innovation, *The Commercial Sexual Exploitation of Children in New York City: Formative Evaluation: The New York City Demonstration 72* (Sept. 2008) (unpublished report) (quoting Judge Camacho), <https://www.ncjrs.gov/pdffiles1/nij/grants/225084.pdf> [<https://perma.cc/WUZ6-9QVB>].

273. Staff, CTR. CT. INNOVATION, <http://www.courtinnovation.org/staff> [<https://perma.cc/U4MX-LLFG>].

274. The theory was pioneered by psychologist Lenore Walker. See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979). For a nuanced elaboration of how particular strands of feminism have popularized and entrenched ideas of psychological trauma within legal discourse and institutions, see Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1201–14 (2010).

275. Interview with Courtney Bryan, Project Dir., Midtown Cmty. Court, Ctr. for Court Innovation, in Manhattan, N.Y. (June 23, 2014) (on file with author).

276. *Id.*

together with war to develop a feminist theory of PTSD.<sup>277</sup> The basic idea is that trauma occurs when a victim experiences the impossibility of action (either resistance or escape) against overwhelming force.<sup>278</sup> In the aftermath of such force, people often experience intense feelings of loss of control and disconnection and their physiological reactions to stimuli may become “overwhelmed and disorganized”<sup>279</sup>—indeed as one early theorist put it: “[T]he whole apparatus for concerted, coordinated and purposeful activity is smashed.”<sup>280</sup> In 2012, Goodman coauthored a study that found that “over 80 percent of the women arrested for prostitution in Manhattan report some form of past or present victimization, including childhood sexual abuse, sexual and/or physical assault, or domestic violence.”<sup>281</sup> As such, she and her CCI collaborators argued, it made sense to understand prostitution defendants as trauma survivors.<sup>282</sup>

CCI began hosting trainings to encourage prosecutors and judges to think broadly about the terms “force, fraud, and coercion” (the legal standard for sex trafficking under federal law).<sup>283</sup> Goodman presented trafficking scenarios that criminal justice professionals would likely perceive as domestic violence—an experience of trauma, she reasoned, already familiar to court personnel. She then used these scenarios to illustrate why women do not leave “intimate-partner pimps” and why a decision to sell sex is often coercively controlled: that is, trafficking in other terms.<sup>284</sup> Mazur made the same point in her trainings: “Once again the parallel to [domestic violence], don’t think she is not a victim, her behavior is trauma-related.”<sup>285</sup>

A similar shift was taking place at the Red Hook Community Court in Brooklyn. In 2008, a new clinical director, Julian Adler, trained in law and social work, “brought a personal interest in the relationship between psychological trauma and addiction, which led to a new focus on identifying

277. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1992). Interview with Miriam Goodman, Assistant Dir. for Anti-Trafficking & Trauma Initiatives, Ctr. for Court Innovation, in Manhattan, N.Y. (July 1, 2015) (on file with author). [hereinafter Interview with Miriam Goodman (July 2015)].

278. HERMAN, *supra* note 277, at 34.

279. *Id.*

280. *Id.* at 35 (quoting ABRAM KARDINER & HERBERT SPIEGEL, *WAR STRESS AND NEUROTIC ILLNESS* 186 (1947) (describing combat neurosis) (emphasis omitted)).

281. SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 3.

282. Interview with Miriam Goodman, Assistant Dir. for Anti-Trafficking & Trauma Initiatives, Ctr. for Court Innovation, in Manhattan, N.Y. (June 24, 2014) (joint interview) (on file with author) [hereinafter Interview with Miriam Goodman (June 2014)].

283. *Id.*

284. *Id.*

285. Interview with Robyn Mazur, Dir. of Special Projects, Violence Against Women, Ctr. for Court Innovation, in Manhattan N.Y. (June 23, 2014) (on file with author).

and treating trauma among Red Hook defendants, especially women involved in prostitution.”<sup>286</sup> According to Adler, at the time most problem-solving courts operated from a unidimensional model driven by drug treatment that emphasized traditional and stigmatized ideas of mental health and pathology and a medical view of addiction, including attention to how defendants may try to manipulate service providers and other court personnel. From this perspective, he explained, “treatment is all about kicking the [criminal] habit and avoiding relapse.”<sup>287</sup>

Along with other social workers experienced in domestic violence, Adler helped to catalyze a broader shift within criminal court reform to see defendants as complex trauma survivors, often including the trauma of childhood sexual abuse. From this perspective, neither traditional ideas of mental illness and addiction nor rational-actor ideas of agency and choice suffice to explain or treat a good deal of crime, including prostitution. Instead, particular kinds of criminal choices, Adler argued, reflect trauma and PTSD. “Debates about agency versus constrained agency notwithstanding,” Adler asserted, “on its face, I think engaging in sex work is traumatic for many people.”<sup>288</sup> Thus he and his staff began referring prostitution defendants to a trauma-informed outpatient mental health clinic.<sup>289</sup> In 2013, social worker Kate Barrow joined Red Hook and introduced a trauma-informed assessment form (that she had developed with Goodman while working at the MCC) to change how clinicians produce knowledge about defendants in court.<sup>290</sup> Questions asked at Red Hook include indications of PTSD such as: “Have you experienced a harm? Have you ever had an experience where you felt really scared, where you have dreams or nightmares about something scary that happened to you?”<sup>291</sup>

286. CYNTHIA G. LEE ET AL., A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 41 (2013).

287. Interview with Julian Adler, Dir. of Research-Practice Strategies, Ctr. for Court Innovation, in Manhattan, N.Y. (July 2, 2015) (on file with author); see also Ursula Castellano, *Courting Compliance: Case Managers as “Double Agents” in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484 (2011). Castellano explains how in mental health courts where “recovery stems from treating the offender’s individual pathology,” case managers scrutinize whether the “client is being truthful, forthcoming, and admitting mistakes . . . . [T]he failure of the offender to properly disclose—either by lying, lying by omission, or not admitting wrongdoing—was classified as a serious violation of the terms of program participation.” *Id.* at 501.

288. Interview with Julian Adler, *supra* note 287.

289. *Id.*

290. Interview with Kate Barrow, Dir. of Staff Training & Dev., Ctr. for Court Innovation, in Brooklyn, N.Y. (Apr. 9, 2015) (on file with author).

291. *Id.* Here, for example, is some language from the form:

In your life, have you ever had any experience that was so frightening, horrible, or upsetting that, in the past month, you:  
Have had nightmares about it or thought about it when you did not want to?

Around the same time, CCI reformers in Queens were also using trauma “as a hook” to rethink the prosecution of women in mental health and drug courts by “building on principles that come from the domestic violence world.”<sup>292</sup> All women diverted into these courts would be screened for domestic violence and sexual assault.<sup>293</sup> Katie Crank, the Assistant Director for Gender and Justice Initiatives, helped to adapt and implement the clinical assessment tool developed by Goodman and Barrow to ask female defendants, for example, whether they experience constraints on their movement and resources, and whether they have had troubling childhood experiences.<sup>294</sup> Based on this assessment, women may be offered trauma-informed counseling and social services. As Crank explained: “This was really kind of a seismic shift: thinking of women who are appearing in the systems as defendants as also victims of trauma.”<sup>295</sup> The shift required judges and prosecutors to think about how trauma influences the choices people make, whether those choices are controlled by a pimp, trafficker, or (other kind of abusive) domestic partner, and thus to stop “think[ing] about recidivism as the only measure of success or failure for a defendant’s recovery.”<sup>296</sup>

As these three examples suggest, it was the uptake of trauma as a specific and newly intelligible clinical diagnosis in New York City problem-solving courts, combined with popular outrage about sex trafficking, that made it possible for reformers to transform how problem-solving courts treated prostitution defendants. As Bryan put it, around 2010, arguments about trauma, domestic violence, and sex trafficking all overlapped, making court reform possible in new ways.<sup>297</sup> To be sure, problem-solving courts have since their inception used mental health diagnoses to influence the form and methods of criminal adjudication in a welfarist direction. But from the perspective of all the reformers described here, trauma and PTSD diverge significantly from other more stigmatized personality disorders commonly identified in problem-solving courts. This is because PTSD, they argue, reflects an ordinary response to external violence. Following Judith Herman,

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Tried hard not to think about it or went out of your way to avoid situations that reminded you of it?

Were constantly on guard, watchful, or easily startled?

Felt numb or detached from others, activities, or your surroundings?

Red Hook Adult Assessment Form (on file with author).

292. Interview with Katie Crank, Assistant Dir., Gender & Justice Initiatives, Ctr. for Court Innovation, in Manhattan, N.Y. (July 1, 2015) (on file with author).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. Interview with Courtney Bryan, *supra* note 275.



Goodman, Mazur, Adler, and others suggest that many kinds of defendant behaviors—that prosecutors and judges may understand as antisocial and hence as risk factors for crime and recidivism—are in fact normal reactions to family and intimate-partner violence and trauma.<sup>298</sup> Or as ethnographer Allan Young explains, unlike other mental health diagnoses, “PTSD reserves one feature for itself: the eponymous event.”<sup>299</sup> The traumatic event, in turn, changes the social meaning of symptomatic behavior—“responsibility . . . shifts from [one’s] will or mind to an external locus.”<sup>300</sup> Feminist court reformers used this argument about the distinctiveness of trauma to introduce a different (and rather complex) set of ideas about how problem-solving courts should administer counseling and welfare in ways that break from responsibilization.

#### F. *The Human Trafficking Intervention Courts*

Like in all problem-solving courts, judges in the HTICs are encouraged to invite prosecutors, defense attorneys, and service providers to collaborate in order to reach mutually agreeable service mandates. Also like all problem-solving courts, the HTICs staff representatives from numerous social service organizations to implement these mandates. As prosecutor Kim Affronti explains of her courtroom:

Every Friday we have at least eight programs represented by at least one service provider appearing in our courtroom, GEMS, Mount Sinai, SAVY, Restore, Garden of Hope, New York Asian Women’s Center, Hidden Victims Project, Community Healthcare Network, as well as the pro-bono project launched in July of 2014 by the Mayor’s Office to Combat Domestic Violence, and Sanctuary for Families . . .<sup>301</sup>

These providers offer counseling as well as other more material services such as free medical care, free legal and immigration aid, and—as much as possible—assistance in accessing education, job training, shelters, and low-income housing. Indeed, a recent New York City budget hearing featured judges, defense attorneys, prosecutors, and social workers all lobbying

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298. Interview with Miriam Goodman (July 2015), *supra* note 277; Interview with Julian Adler, *supra* note 287; Interview with Robyn Mazur, *supra* note 285; see also Miriam Goodman & Robyn Mazur, *Identifying and Responding to Sex Trafficking*, in A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS 89, 93–95 (2014). They argue that popular evidence-based (risk-need-responsivity) tools that measure risk of recidivism—via factors such as antisocial behavior, attitudes, associations, and personality characteristics—are misapplied when applied to victim-defendants of trafficking.

299. Allan Young, *Reasons and Causes for Post-Traumatic Stress Disorder*, 32 TRANSCULTURAL PSYCHIATRIC RES. REV. 287, 289 (1995).

300. *Id.*

301. *Effectiveness of Human Trafficking Intervention Courts: Oversight Hearing Before the Comm. on Courts & Legal Servs. and the Comm. on Women’s Issues*, New York City Council 102–03 (Sept. 18, 2015) [hereinafter *Council Hearing 9/18/15*] (statement of Kim Affronti, Queens District Attorney’s Office).

lawmakers for appropriations for shelter beds, longer term housing options, healthcare provisions, job training, and immigration services for HTIC defendants<sup>302</sup> (prompting the city to allocate a modest grant of \$750,000 for the 2016 fiscal year to service providers working in the New York City HTICs).<sup>303</sup>

What is distinctive about the HTICs from a court reform perspective is not that they aim to provide prostitution defendants with services—that aspiration defines alternative prostitution courts—but rather how the welfare logics that operate in the HTICs have changed. I make this case here by illustrating how the HTICs combine *decontextualization* with trauma-based theories of social control and confusion about measurable goals and efficiency.

*1. Decontextualization.*—Like all problem-solving courts (and Progressive-era socialized courts before them), the HTICs promise attention to the individual offender and to the social context informing her prosecution. As Judge Kluger told lawmakers at a city council hearing on the HTICs, “[e]verything is on a case-by-case basis [because] we don’t make general rules in how cases are handled, but the judges understand the dynamics.”<sup>304</sup> But as we have seen, few alternative criminal courts in fact execute this commitment. In the HTICs, however, the challenge is different. As Gruber, Mogulescu, and I observe, the HTICs purposefully deploy a decontextualized understanding of all defendants as trafficking victims.<sup>305</sup>

They do so in large part because trauma-informed court reformers argue that trauma may be hidden and defendants may be—indeed often are—unwilling to disclose any evidence of past or present abuse. As such, Bryan offers, “there is no reason to treat defendants differently; we don’t want to have a court that only serves trafficking victims that we can tell.”<sup>306</sup> Mazur

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302. *Preliminary Budget Hearing: Hearing Before the Comm. on Courts & Legal Servs.*, New York City Council 10 (Mar. 27, 2015) [hereinafter *Council Hearing 3/27/15*].

303. See *Council Hearing 9/18/15*, *supra* note 301, at 6 (statement of Chairperson Rory I. Lancman). For some sense of the numbers of people processed through the NYC HTICs potentially accessing its social services, in 2015, there were 1,616 arrests for prostitution or loitering for the purposes of prostitution (0.84% of total misdemeanor arrests). This number, however, includes people with multiple arrests as well as people who may not have entered the HTIC system perhaps because the DA declined to prosecute, they took a plea on arraignment, or perhaps because they had a combination of other charges that made them HTIC ineligible. See N.Y. State Div. of Criminal Justice Servs., Computerized Criminal History System (Jan. 2016), in e-mail from Dean Mauro, N.Y. State Div. of Criminal Justice Servs., Office of Justice Research & Performance (Mar. 28, 2016, 08:12 EST) (on file with author) [hereinafter *DCJS NYC 2016*].

304. *Council Hearing 12/12/13*, *supra* note 239, at 41 (statement of Judge Judy Kluger) (describing how judges would respond to recidivist offenders).

305. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1376–77).

306. Interview with Courtney Bryan, *supra* note 275.

similarly argues that court benefits should not turn on evidence or self-disclosure of trauma and abuse. “I kind of have a presumption of abuse,” she says flatly.<sup>307</sup> In cases of prostitution “we feel like it’s a hidden victim.”<sup>308</sup>

A presumption of trauma is precisely what justifies the courts’ double-prosecutorial and service-oriented mission. Prostitution defendants are arrested and prosecuted based on factual evidence of violating New York statutory provisions against prostitution or against loitering for the purpose of engaging in a prostitution offense.<sup>309</sup> But then they are offered a lenient, even noncriminal, and service-based disposition *without* evidence of abuse or coercion. For a criminal court, this is an uneasy position. Consider this conversation between Councilmember Williams and Judge Kluger during a New York City Council meeting explaining how the HTICs work.

Williams: [H]ere we’re talking about . . . human trafficking in particular, not prostitution in general. I wanted to understand the definition that is used when you’re figuring out who is trafficked and who is not.

Kluger: That’s a great question and by and large we work under the assumption that anyone who’s charged with this kind of crime is trafficked in some way.

Williams, puzzled by the idea that a criminal court would consider all criminal defendants trafficking victims, repeats his question.

Williams: So I just want to understand is there a line between what for this program is considered trafficked and just prostitution . . . .

Kluger: So trafficking is a crime and traffickers can be charged . . . . [B]ut we don’t make an assessment on each person who’s charged [with prostitution] that you were or were not trafficked . . . . Anyone who comes into these courts services charged with prostitution or prostitution-related offenses are able to *get the services and get the favorable resolution that we hope will come out of this*. There is no artificial bar that says well, we don’t think you were trafficked . . . .<sup>310</sup>

Many HTIC stakeholders work to maintain this idea of an undifferentiated victim deserving of a beneficial disposition. Social workers

307. Interview with Robyn Mazur, *supra* note 285.

308. *Id.* Judge Serita makes the same point: “[B]ecause there is such tremendous difficulty identifying victims of trafficking, the courts provide the same services to all defendants who come before the court.” *Council Hearing 9/18/15*, *supra* note 301, at 19 (statement of Judge Toko Serita).

309. N.Y. PENAL LAW §§ 230.00, 240.37 (McKinney 2008).

310. *Council Hearing 12/12/13*, *supra* note 239, at 38–40 (emphasis added); *see also Council Hearing 3/27/15*, *supra* note 302 (statement of Judge Toko Serita) (“Because of the tremendous difficulty identifying victims of trafficking we provide the same services to all the defendants interested in programs with the court based on an understanding that some may disclose their victimization later but that virtually all of them fall into categories that place them at high risk of being trafficked.”).

concerned with client privacy argue for generic service mandates that do not require individualized psychological assessments or reports.<sup>311</sup> Defense attorneys, who explain that defendants rarely share evidence of victimization—and often do not understand themselves in this language—likewise want to protect their clients from prosecutors who may seek evidence to prosecute abusers or to justify more intensive service mandates.<sup>312</sup> Thus, as one HTIC judge explained, “it’s really rare” that specific evidence of victimization or trauma comes to judicial attention.<sup>313</sup>

2. *Social Control Based on Theories of Trauma.*—Thus we have a court prosecuting an undifferentiated mass of trauma victims who may or may not identify as such. Unsurprisingly then, the HTICs’ trauma-based approach to social control is its most complex and ambiguous innovation. On the one hand, it is grounded in totalizing psychological descriptions of the victimizing effects of trauma—most especially childhood trauma. On the other hand, social workers simultaneously use the language of trauma to advance client self-determination. This apparent contradiction requires some careful explication.

a. *The Prostitution Defendant as Traumatized Child.*—As the dialogue between Councilmember Williams and Judge Kluger above suggests, prostitution-abolitionist court reformers know well that a collapse of all prostitution into trafficking is tricky terrain. Trafficking describes the moment when economic transactions cease to be market exchange (not free trade but forced labor)—a case they simply cannot make for all defendants in HTICs, especially without facts of coercion or abuse. Perhaps for this reason, abolitionist advocates do not analogize prostitution defendants to slaves so much as to children—that is, to people without the legal capacity and culpability (even if they formally have the freedom) to engage in certain kinds of transactions—an analogy, I argue, that has transformed HTIC models of social control.

Here is how this analogy unfolds. Advocates argue that most adult defendants enter prostitution as children, which is itself an effect and experience of trauma (a constantly invoked statistic based, I should add, on shaky empirical support).<sup>314</sup> For example, Norma Ramos, Executive Director

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311. Interview with Kate Barrow, *supra* note 290; Interview with Miriam Goodman (June 2014), *supra* note 282.

312. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1375–77).

313. Interview with John T. Hecht, Presiding Judge, Brooklyn Human Trafficking Intervention Court, in Brooklyn, N.Y. (June 25, 2014) (joint interview) (on file with author).

314. The most cited source for the claim that most individuals enter prostitution as young adolescents is a 260-page report written with funding from the DOJ. RICHARD J. ESTES & NEIL

of the Coalition Against Trafficking in Women (a prostitution-abolitionist group) explained to lawmakers: “Keeping in mind that the average prostituted woman enters prostitution at age 14[,] . . . it is severe childhood trauma that sets a woman up for being vulnerable to prostitution.”<sup>315</sup> Or as Sarah Dolan, an advocate at Sanctuary for Families (also a prostitution-abolitionist group) asserts, “children often remain in conditions of prostitution as adults because they are so deeply traumatized that they see no alternative.”<sup>316</sup> From this perspective, the prostitution defendant is, as Judith Herman writes of survivors of childhood trauma more generally, “the child grown up.”<sup>317</sup> “[T]he child victim, now grown,” Herman explains, “seems fated to relive her traumatic experiences not only in memory but also in daily life.”<sup>318</sup> Thus, when Ramos tells lawmakers that prostitution defendants are properly understood as “ex-children,” she is staking a psychological, if not literal, description: ex-children are people whose childhood personalities, inexorably shaped by traumatic events, persist into adulthood in stunted and maladaptive ways.<sup>319</sup>

This idea of the prostitution defendant as an ex-child is also a legal claim. Advocates argue that the fact of high incidences of childhood prostitution also means that most adults in prostitution meet a legal definition of trafficking victim. Dolan’s colleagues Dorchen Liedholdt and Katherine Scully elaborate:

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ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* (2002). The authors’ own caveat about the limitations of their data did not travel as the report circulated widely among advocates. *See id.* at 143–44 (stating that a different methodology and more resources would be needed to perform “a national prevalence and incidence survey” to produce “an actual headcount”). For some criticisms of the study, see Chris Hall, *Is One of the Most-Cited Statistics About Sex Work Wrong?*, ATLANTIC (Sept. 5, 2014), <https://www.theatlantic.com/business/archive/2014/09/is-one-of-the-most-cited-statistics-about-sex-work-wrong/379662/> [<https://perma.cc/KZ86-DFCU>]; Michelle Stransky & David Finkelhor, *How Many Juveniles Are Involved in Prostitution in the U.S.?*, CRIMES AGAINST CHILD. RES. CTR. (2008), [http://www.unh.edu/ccrc/prostitution/Juvenile\\_Prostitution\\_factsheet.pdf](http://www.unh.edu/ccrc/prostitution/Juvenile_Prostitution_factsheet.pdf) [<https://perma.cc/3TZ7-KUYL>].

315. *Council Hearing 9/28/06*, *supra* note 261, at 182 (statement of Norma Ramos, Executive Director, Coalition Against Trafficking in Women).

316. *Council Hearing 6/27/11*, *supra* note 254, at 3 (statement of Sarah Dolan, Advocate Counselor, Sanctuary for Families).

317. HERMAN, *supra* note 277, at 110.

318. *Id.* at 111.

319. *Council Hearing 4/25/12*, *supra* note 257, at 165 (statement of Norma Ramos). Ramos beseeched lawmakers:

Please do not take the easy road out and just focus on children, it is important and all the advocates before me addressed the importance of including women. . . . [W]e must not turn our backs on those *ex-children*, is who I call them, who will more than likely still remain in prostitution . . . .

*Id.* (emphasis added).

Experts estimate that the average age of entry into prostitution for females is twelve to fourteen. Anyone prostituted as a child is by definition a trafficking victim under both the Trafficking Protocol and the federal anti-trafficking law. Since most adults in prostitution were initially prostituted as children (age seventeen or younger) and since prostituted children are necessarily victims of trafficking, one could reasonably conclude that the majority of prostituted adults have been subjected to sex trafficking at some point in their lives.<sup>320</sup>

On this view, adult sellers of sex, even when they are self-employed, perpetually retain their legal status as childhood victims. Dolan illustrates the point by describing a client, Lakeesha, who was first arrested for prostitution at 15 after she had run away from home to escape an abusive stepfather, and who “[l]ike many domestic sex trafficking victims, . . . believed that her trafficker was her boyfriend.”<sup>321</sup> Dolan continues:

Now at 20, Lakeesha is still in prostitution although not under pimp control. Some might contend that Lakeesha has become a free agent and is no longer a trafficking victim, but those of us at Sanctuary [for Families] believe otherwise. Adult women in prostitution who first experience sexual exploitation as children (which we may assume to be the majority of prostituted women, since the average age of entry into prostitution is 13), should be recognized and protected as trafficking victims.<sup>322</sup>

This position isn’t simply advanced by advocates. It has been institutionalized by the New York City HTICs. A presumption that “most,” “the majority of,” or the “average” adult defendant has experienced either childhood sexual assault or the selling of sex as a minor is precisely what justifies diversionary and service-oriented sentences. As the Executive Assistant District Attorney in Manhattan, Karen Friedman-Agnifilo, explains: “[W]e’ve found . . . even if our case[s] are involving adult victims, most of them started when they were minors, or when they were young. So, even though today it doesn’t involve a child trafficking victim, they were trafficked at some point in their life.”<sup>323</sup> Or as a former CCI official puts it:

Just knowing the average age of entry into prostitution in the US is fourteen or fifteen . . . that’s actually de facto coercive control and trafficking under our law. Therefore the assumption is that every

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320. Leidholdt & Scully, *supra* note 255, at 33. In their words: “[L]earning that a woman has been in prostitution should create a presumption that she is a trafficking victim.” *Id.* at 34.

321. *Council Hearing 6/27/11*, *supra* note 254, at 2–3 (statement of Sarah Dolan, Advocate Counselor, Sanctuary for Families).

322. *Id.* at 3.

323. *Council Hearing 4/25/12*, *supra* note 257, at 54 (statement of Karen Friedman-Agnifilo, Executive Assistant District Attorney, Manhattan District Attorney’s Office).

person with these charges could have a nexus with trafficking and they should be in specialized courts with dedicated prosecutors, dedicated defense attorneys, specialized services and trained judicial staff.<sup>324</sup>

But if the adult prostitution defendant is “the child grown” victim, it would seem perverse to teach her to develop a more hardheaded relation to risk or to take responsibility for her bad choices, just as it would seem perverse as the basis for administering welfare to exploited children. Precisely for this reason, the New York City HTICs have instantiated new trauma-informed models of court-mandated treatment.

*b. Trauma-Informed Care.*—Service providers widely suggest they use court mandates to foster supportive and noncommodified social relationships. As Julie Laurence of Girls Educational and Mentoring Services (GEMS) (a service provider that helped launch the HTIC initiative) explains of her clients:

They’ve experienced family trauma and disconnect[ion]. They’ve been neglected and abused often for years prior to their exploitation and they as children and young adults are desperately craving love, attention, and support. Of course pimps and traffickers play upon the need for connection and belonging creating a faux family and often creating intense relationships that seem to initially and superficially meet those needs.<sup>325</sup>

From this perspective, a primary aim of service interventions is to create new forms of social connection. “Leaving those [exploitative] relationships,” Laurence continues, “therefore takes building new ones, healthy ones with consistent supportive adults who don’t ask anything from them, who don’t exploit them and see you as valuable as a human being not a commodity.”<sup>326</sup>

To that end, social workers (employed or contracted by the courts) use counseling sessions *not* to teach defendants about risk and responsibility, as in the early MCC, but rather to build trust and especially community. “Traumatic events,” Herman argues, “destroy the sustaining bonds between individual and community”; for this reason “[t]he solidarity of a group provides the strongest . . . antidote to traumatic experience.”<sup>327</sup> To make space for new more solidaristic social connections, social workers may devote an entire first session to discussing stereotypes—for example, inviting conversation about relational constructs such as “prostitute” and “pimp” or

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324. Interview with Kristine Herman, Strategic Initiatives Specialist, Brooklyn Def. Servs. (June 10, 2014) (joint interview) (on file with author).

325. See *Council Hearing 3/27/15*, *supra* note 302, at 27–28 (statement of Julie Laurence, Chief Program Officer, Girls Educational and Mentoring Servs. (GEMS)).

326. *Id.* at 28.

327. HERMAN, *supra* note 277, at 214.

“social worker” and “client.”<sup>328</sup> In subsequent sessions, they may broach topics such as safety, identifying feelings, and setting boundaries.<sup>329</sup> And, when possible, social workers will try to address some of the defendants’ concrete material needs—for example, getting a driver’s license, scheduling a doctor’s appointment, or finding a domestic violence shelter. Judge Camacho likewise describes his understanding of good trauma-informed social services as building from social relationships:

The first session we take her for ice cream. The second session, we simply walk around the park. Third time they come in we take them to the movies. Fourth time, we take them to the hospital for a checkup. The fifth time we try to get them to go get a Social Security card. Sixth time, we take them to Children’s Services to try to get their kids back. It’s a process. It’s about getting them somehow, not directly, but still getting them to understand and appreciate that [the service providers] care about them. That you care about them and they trust you, gaining their confidence.<sup>330</sup>

Nor do social workers describe any of the counseling or services they offer as a “voluntary choice” made by an autonomous and responsible defendant as an alternative to a traditional criminal disposition. As Goodman puts it: “For our clients, counseling sessions are court mandates.”<sup>331</sup> And mandates, rather than viewed as their own experience of practicing responsibility—for example, via penalties for late or missed appointments (a common and purposeful practice in other problem-solving courts)—are supposed to be applied with flexibility and creativity in ways that recognize “the constraints of [defendants’] real lives.”<sup>332</sup> Theories of trauma have thus demonstrably changed the models for social treatment that prostitution defendants are supposed to encounter in court.

But here is what makes this treatment model rich, complex, and even transgressive. The trauma-informed programs pioneered by Goodman and

328. Interview with Miriam Goodman (July 2015), *supra* note 277.

329. *Id.*; see also SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 5. Other classes may include arts education to allow clients to engage in creative outlets and relaxation techniques. *Id.*

330. Interview with Fernando Camacho, *supra* note 269.

331. Interview with Miriam Goodman (July 2015), *supra* note 277.

332. *Hearing 9/18/15*, *supra* note 301, at 126 (statement of Avery McNeil, Bronx Defenders). Judge Serita says much the same:

A lot of times, if somebody is having problems . . . fulfilling the mandate, we want to find out what the reason is. The reason might be because they have so many things going on they are completely overwhelmed by the circumstances of their lives. They may have, you know, children in foster care. They may be going through homelessness. They may be having problems with their exploiters, and so we want to find out information about what is going on with their current situation.

*Id.* at 45–46 (statement of Judge Toko Serita).



her colleagues do not presume totalizing or infantilizing victimization even as they move away from models of responsabilization. Consider how one experienced social worker, who has worked with HTICs throughout New York City (and wishes to remain anonymous), understands her role—it's a nuanced position, so I elaborate it at some length.

To begin, this social worker ventures that many of her clients began working for someone, such as a boyfriend, as a teenager, but then proceeded to work on their own: "So often they start as victims of trafficking but then they get to a certain age and they no longer choose to work for someone."<sup>333</sup> She nonetheless lobbies court actors to understand that the defendants' acts are coerced, not volitional, in part because of the trauma they experienced in families as children—so far a very familiar position. For example, she explains that she must constantly educate judges and prosecutors that "the significant amount of trauma [means that] often this is not a choice for a person who is exploited. Often times, people enter [prostitution] because of exploitation from very early ages," including by sexually abusive families and caregivers.<sup>334</sup>

But in her interactions with prostitution defendants, her therapeutic stance is more complex: here she works to advance client agency and choice. Despite these traumatic histories, she continues, "Our clients do not want to be seen as someone who was exploited. If you ask them if they are working for someone they will tell you no, I'm working on my own."<sup>335</sup> In counseling sessions, she therefore makes clear that she respects client self-determination: "We respect the fact that they're earning money and this is the way they are choosing to do so. Some people are making more money doing sex work than they would in other jobs."<sup>336</sup> As such, she would only ever counsel a client to "keep yourself safe" while working.<sup>337</sup> In other words, cultivating a trauma-informed practice involves simultaneously recognizing defendants as victims and agents: people who are not (and should not be legally) responsible for all their choices even as they *have* the autonomy to make them. As the basis for administering social welfare and social control, trauma theory thus invites a break from both an overly pathologized and overly responsabilized subject in favor of a more complex encounter with the human condition.

I observed this position repeatedly among trauma-informed social workers. From their perspective, it is not that concepts like responsibility,

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333. Interview with NYC Social Worker, in Brooklyn, N.Y. (June 26, 2014) (joint interview) (on file with author).

334. *Id.*

335. *Id.*

336. *Id.*

337. For example, "Go with your regular [customers], don't take the chance of meeting an undercover cop and getting arrested again." *Id.*

agency, and choice are unimportant to prostitution defendants (or for that matter to children). It is just that these concepts are not understood as the basis of problematic behavior, nor can they be leveraged as their own form of treatment and recovery in any sort of easy or pedagogical way. Rather, they must be incrementally and carefully cultivated through the therapeutic relationship—because agency and choice are precisely the experiences of the self that trauma denies. As a model of social control and therapeutic enculturation, trauma thus makes space for dependency *and* self-determination. Or at least trauma as it is understood by a particularly sophisticated set of New York City HTIC clinicians working to change how criminal courts administer social welfare and therapeutic treatment.

*c. A Note About Trauma in Court Practice.*—That all said, I would be remiss to conclude this section on trauma-based social controls without mentioning that in actual court practice, arguments about trauma often take more simplistic, incomplete, and coercive forms. Prostitution defendants who complete a trauma-informed counseling program of the kind described above are supposed to receive a lenient and service-based disposition: optimally an offer of an adjournment contemplating dismissal (ACD). If defendants who are offered an ACD are not rearrested within six months, then the charge is supposed to be dismissed and sealed.<sup>338</sup> In 2014, 47% of prostitution cases in New York City received an ACD compared to 13% in 2008.<sup>339</sup> While this increase in ACDs is significant, it also means that many defendants leave their “human trafficking interventions” marked with a criminal disposition.

As I explore in detail with Gruber and Mogulescu, defendants who are not offered ACDs may have multiple offenses, including drug offenses as well as offenses involving property or physical violence.<sup>340</sup> Activists wishing for lenient outcomes must thus argue that recidivism and multiple or complex charges likewise reflects trauma and victimization—an argument that often competes unsuccessfully with mandates for individual responsibility and accountability that continue to predominate in criminal court—even paradoxically in a court that is designed for trafficking victims.<sup>341</sup>

Moreover, even when victim-based advocacy prevails, in New York City HTICs rather blunt forms of paternalism can follow, including criminal incarceration. Here, for example, are some of the cases that Gruber, Mogulescu, and I catalogue. We describe cases where judges and

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338. See Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1362) for elaboration.

339. In 2014, 7% of prostitution defendants received jail sentences compared to close to 20% in 2008. See DCJS NYC 2016, *supra* note 303.

340. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1372–74).

341. *Id.*

prosecutors have kept prostitution defendants in jail explicitly to prevent them from reuniting with intimate partner pimps who are abusing them. In one instance a recidivist prostitution defendant (originally incarcerated by the arraignment judge as a flight risk) spent twelve days in jail until a defense team could persuade the prosecutor of an adequate alternative housing arrangement.<sup>342</sup> In another case, a defendant who had disclosed that she had been trafficked by an intimate partner was jailed while awaiting residential drug treatment. Specifically, the prosecutor stated: “I do not want to see Ms. F going back to her ex-boyfriend, whatever she thinks he is. In my eyes, that’s the person that’s exploiting her and that’s just not a good situation, Judge. I am going to ask that she be[] remanded [to jail].”<sup>343</sup> The Court agreed: “She certainly cannot go back to her ex-boyfriend who’s abusive so that is not an option.”<sup>344</sup>

And to be sure, even as defense attorneys report that many defendants value new trauma-informed court-mandated services, they simultaneously explain that defendants experience all welfare dispensed in the HTICs as inextricably linked to arrest and incarceration.<sup>345</sup> As one public defender told us:

Last week, a client of mine walked out of the courtroom after her court appearance extremely upset. The judge was concerned, called me up to the bench, and said, “Whatever it is your client needs—be it food, shelter, clothing—make sure she gets help.” When I met my client outside the courtroom, she explained to me that she was upset about the judge saying that if she didn’t complete services she would get 15 days jail.<sup>346</sup>

Thus, as we make clear, the welfarist mandate of the New York City HTICs does not mean that the women brought before the court evade penal sanctions. To the contrary, not unlike the New York Women’s Court, new social controls—here informed by theories of trauma—have produced new justifications for welfare *and* new justifications for penal supervision and incarceration.<sup>347</sup>

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342. For details, see *id.* at 27–28.

343. *Id.* at 45 (quoting transcript of Record, Criminal Court Proceeding, Docket No. 2011QN053666 (Queens Cty. Crim. Ct., Jan. 15, 2015)).

344. *Id.*

345. *Id.* at 47–48.

346. *Id.* at 37 (quoting Interview with Zoe Root, Attorney, Bronx Defs., in N.Y., N.Y. (June 26, 2014)).

347. Given the common “net-widening” criticisms of problem-solving courts, I should add that the total number of arrests for prostitution and loitering for the purposes of engaging in a prostitution offense has declined (along with a general decline in misdemeanor arrests in New York City). In 2015, New York City made 1,616 arrests for prostitution and loitering, a 20% decrease from 2014

*d. Measuring Exactly What?*—Finally, when asked about the overarching goal of the HTICs as a new kind of problem-solving court, numerous proponents suggest they aim to “minimize re-traumatization.”<sup>348</sup> Unsurprisingly, this aim has bewildered those who want to measure success via traditional court benchmarks such as recidivism rates and cost savings to the criminal justice system via an “economic style of reasoning” that today dominates penal administration.<sup>349</sup> Indeed, at a recent city council hearing the Chairperson invited “testimony from different stakeholders regarding . . . what might be the appropriate metrics or qualitative measures to evaluate the service providers.”<sup>350</sup> One CCI official proposed that stakeholders would need “to identify and achieve performance measures and metrics for our programming that are responsive to the context of the women and transgender individuals receiving counseling and support,” for example, tracking how many individuals “engage in counseling voluntarily following the completion of their mandate.”<sup>351</sup> Other CCI clinicians have proposed to track the “strides these women and girls make in diversion programs,” such as whether they have protection orders against traffickers, places to live, jobs, or simply whether they call the court to check in with their social service program.<sup>352</sup>

#### G. *Trauma and the Welfare State?*

This Article has compared three moments of specialized prostitution court reform in New York City: the Women’s Court during the first part of the twentieth century, the Midtown Community Court of the 1990s, and the Human Trafficking Intervention Courts of today. It did so in order to illustrate how different representations of the “social problem” of prostitution combine with different models of procedural informalism to mix social welfare, social control, and individual responsibility in three different slices of court reform—and in ways, I will suggest, that not only illuminate features of alternative criminal courts but that perhaps also raise questions about the contemporary American welfare state.

Prostitution, we have seen, engages a set of human relations and transactions that reformers sometimes analogize to the market, sometimes to the family. In the early twentieth century, court reformers described the

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(when it made 2,018 arrests) and an almost 28% decrease since 2013 (when it made 2,238 arrests), when the HTICs were first opened. DCJS NYC 2016, *supra* note 303.

348. Interview by Aya Gruber with Toko Serita, Presiding Judge, Queens Cty. Human Trafficking Intervention Court, in Queens, N.Y. (June 24, 2014) (on file with author).

349. GARLAND, *supra* note 1, at 190.

350. *Council Hearing 9/18/15*, *supra* note 301, at 7 (statement of Chairperson Rory I. Lancman).

351. *Id.* at 32 (statement of Afua Addo, Women’s Servs. Coordinator, Hidden Victims Project).

352. SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 7.

problem of prostitution as a product of exploitation in both labor and commercial markets. And they launched the New York Women's Court as part of a broader reformist orientation to expand state intervention in the market alongside economic and social protection—when state intervention and state protection were becoming politically popular ideas. In the 1990s, as social welfare was increasingly designed instead to compel individual responsibility, court reformers described the problem of prostitution as part of a broader “quality of life” epidemic eroding market stability and community life, and they proposed to offer prostitution defendants better tools to manage risk and engage in self-care. By contrast, the architects of today's New York City HTICs removed prostitution from a market paradigm—where today dominant state-welfare and regulatory ideas remain minimalist. And they placed it squarely within a family trauma/domestic violence paradigm, which feminists have established as a more robust site of government intervention—indeed, even as an exception to welfare-state retrenchment at least when there are people in families understood as victims.<sup>353</sup> As such, rather than the possibility of market exploitation that justified the work of the Women's Court in the 1910s and 1920s, the New York City HTICs rely upon the probability, if not the certainty, of family trauma; now “people arrested for prostitution ha[ve] all kinds of *social service needs*.”<sup>354</sup>

It would seem that today this model is spreading. In 2013, CCI helped to spearhead the Human Trafficking and State Courts Collaborative to help other states replicate HTICs.<sup>355</sup> Several states, including Texas, Ohio, Illinois, Louisiana, and Tennessee, currently host specialized prostitution courts informed by a trauma-based/anti-trafficking model.<sup>356</sup> In 2015, CCI

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353. The PRWORA, for example, exempts domestic violence victims from key provisions (such as time limits on welfare eligibility, family caps—that limit funding to a mother who gives birth to a child while on welfare—and child support requirements) that are intended to condition support on the exercise of personal responsibility and to limit the total support a family can receive from the state. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 602(a)(7) (2012) (domestic violence option); *id.* § 608(a)(7)(C) (hardship exception).

354. SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 4 (emphasis added).

355. *Resources*, HUM. TRAFFICKING & THE ST. CTS. COLLABORATIVE, <http://www.htcourts.org/resources.htm> [<https://perma.cc/G8CD-S9T7>].

356. *See, e.g.*, NEW LIFE: PROSTITUTION DIVERSION INITIATIVE, <http://www.pdnewlife.org> [<https://perma.cc/ZH2F-SEA8>] (Texas); Alan Johnson, *Outside Review Praises Franklin County Court for Human-Trafficking Victims*, COLUMBUS DISPATCH (Sept. 4, 2015), <http://www.dispatch.com/content/stories/local/2015/09/04/outside-review-praises-franklin-county-court-for-human-trafficking-victims.html> [<https://perma.cc/ZGS2-VW92>] (Ohio); *Caddo District Attorney's Office Offers Prostitution Diversion Program*, KSLA NEWS (Mar. 1, 2016), <http://www.ksla.com/story/31237617/caddo-district-attorneys-office-offers-prostitution-diversion-program> [<https://perma.cc/KXB3-7RBC>] (Louisiana); Press Release, Cook Cty. State's Attorney's Office, Cook County Unveils New Prostitution and Trafficking Intervention Court (May 29, 2015), [http://www.statesattorney.org/press\\_ProstitutionAndTraffickingInterventionCourt.html](http://www.statesattorney.org/press_ProstitutionAndTraffickingInterventionCourt.html)

published a “planning toolkit” for states to design prostitution courts based on a “trauma-informed approach.”<sup>357</sup> Also in 2015, Chief Judge Lippman (along with numerous institutions including the State Justice Institute, the Conference of Chief Justices, and the Conference of State Court Administrators) hosted in Manhattan a “National Summit on Human Trafficking and the State Courts” that boasted over 300 judges and court administrators from 46 U.S. states.<sup>358</sup> That same year Congress enacted the Justice for Victims of Trafficking Act, which authorizes the Attorney General to provide grants to create problem-solving courts, including “specialized and individualized . . . treatment program[s]” for juveniles charged generally with crimes and also identified as potential trafficking victims.<sup>359</sup> In addition to court reform, criminal justice advocates increasingly justify proposals for prison and sentence reform by arguing that a range of criminal offenses committed by incarcerated girls and women “are rooted in the experience of abuse and trauma.”<sup>360</sup>

Trauma diagnoses and trauma-informed care, especially for girls and women, is also spreading to state and federal service providers beyond the criminal justice system—a perhaps predictable development given how, as this Article has argued, logics of welfare and criminal justice administration often intertwine. For example, in 2005, the federal Substance Abuse and Mental Health Service Administration (SAMHSA) created a National Centre for Trauma-Informed Care, which, in 2009, launched a Federal Partners Committee on Women and Trauma.<sup>361</sup> The Committee encourages federal agencies (e.g., Education, Health and Human Services, Labor, Justice, Housing and Urban Development) to adopt a trauma perspective to inform their practices and service provision.<sup>362</sup> In New York, CCI worked with the

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[<https://perma.cc/Y7G3-WVJY>] (Illinois); Stacey Barchenger, *Nashville Launches Human Trafficking Court*, TENNESSEAN (Jan. 26, 2016) <http://www.tennessean.com/story/news/2016/01/26/nashville-launches-human-trafficking-court/79296388/> [<https://perma.cc/AD6M-QZRM>] (Tennessee).

357. See generally CTR. FOR COURT INNOVATION, RESPONDING TO SEX TRAFFICKING IN YOUR JURISDICTION: A PLANNING TOOLKIT (2015).

358. *Chief Judge Opens Human Trafficking Summit*, DAILY RECORD (Oct. 9, 2015), <http://nydailyrecord.com/2015/10/09/chief-judge-opens-human-trafficking-summit> [<https://perma.cc/LFY5-HWQF>].

359. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 203(b)(4)(C) (2015).

360. HUMAN RIGHTS PROJECT FOR GIRLS ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY 7 (2015).

361. *Background*, THE FED. PARTNERS COMM. ON WOMEN & TRAUMA, <https://www.blsmettings.net/traumainformednation/index.cfm?action=background> [<https://perma.cc/8LAX-4MRE>].

362. See FED. PARTNERS COMM. ON WOMEN & TRAUMA, WOMEN AND TRAUMA: REPORT: A FEDERAL INTERGOVERNMENTAL PARTNERSHIP ON MENTAL HEALTH TRANSFORMATION 17–18, 21, 32, 37 (2011); FED. PARTNERS COMM. ON WOMEN & TRAUMA, WOMEN AND TRAUMA: TRAUMA-INFORMED APPROACHES: FEDERAL ACTIVITIES AND INITIATIVES 8 (2013); see also

State Education Department to provide education and job placement services to individuals not only “diagnosed as intellectually or developmentally challenged or disabled” but also diagnosed as suffering from trauma.<sup>363</sup>

Indeed, Adler, now CCI Director for Research-Practices Strategies, observes that “everyone is talking about trauma-informed care” in the criminal justice system and beyond.<sup>364</sup> “But why at this moment,” he astutely asks, “do we have this new common sense?”<sup>365</sup> Adler’s query is particularly intriguing given Herman’s argument that the kind of harm that becomes intelligible as *trauma* is itself a contextual, historical, and political question.<sup>366</sup>

A comparison between the New York City HTICs and the MCC prostitution diversion program in the 1990s suggests a double-edged response, and one that perhaps also tells us something about welfare politics and ideas today. On the one hand, the HTICs have enabled feminist court reformers to provide social welfare to prostitution defendants in ways less beholden to ideas of individual responsibility, cost-benefit calculations, and medicalized expertise. Cast more generally, it would seem that trauma allows progressive criminal justice reformers to install different ethical relationships and moral obligations into penal welfare institutions. Goodman, for example, trains her clinical court staff to “bear witness” to human suffering which, in turn, “requires court staff to risk connecting to their clients. It means really caring about them and understanding them as complicated humans.”<sup>367</sup> From this perspective, witnessing and working to alleviate human suffering also requires a measure of anti-expertise. “We don’t use a medical model that suggests the therapist knows better,” Goodman continues, “we treat the client as her own expert and we actually believe her when others would likely not.”<sup>368</sup> “What this means,” she concludes, “is that we have to acknowledge that, as complicated humans, we aren’t different from them.”<sup>369</sup>

In other words, trauma theory pushes against a late twentieth-century welfare ethos embodied in the first wave of problem-solving courts, which

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SAMHSA’S TRAUMA & JUSTICE STRATEGIC INITIATIVE, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 12–14 (2014) (providing guidance and recommendations for reform practice and service provision in areas such as child welfare, education, criminal and juvenile justice, primary health care, and the military).

363. *Council Hearing 9/18/15*, *supra* note 301, at 98 (statement of Afua Addo, Women’s Servs. Coordinator, Hidden Victims Project).

364. Interview with Julian Adler, *supra* note 287.

365. *Id.*

366. HERMAN, *supra* note 277, at 9.

367. Interview with Miriam Goodman (July 2015), *supra* note 277. She credits this practice to LAURA VAN DERNOOT LIPSKY & CONNIE BURK, *TRAUMA STEWARDSHIP: AN EVERYDAY GUIDE TO CARING FOR SELF WHILE CARING FOR OTHERS* (2009).

368. Interview with Miriam Goodman (July 2015), *supra* note 277.

369. *Id.*

suggests that people live risky, vulnerable, and criminal lives either because they fail on their own merits or because of stigmatizing forms of mental illness. It instead casts prostitution defendants as normal subjects who experience overwhelming and external violent interpersonal conditions, and it enables social workers and other service providers to practice forms of solidarity with them. It is for this reason, I suspect, that trauma appeals to many left-progressive actors as a model for blending social welfare with social control from within the constraints of a criminal court—particularly when compared to other problem-solving and conventional court alternatives.

But if trauma is attractive to some court actors because it offers a new ethical and moral script for social service provision to people who are poor, it is also, I suspect, attractive to many others—and *this is the other hand*—because as a script for providing welfare, trauma includes its own contemporary limits. Indeed, as a reason to justify welfare, trauma need not engage with class or market analysis at all. Today, as people in their identities as both market actors and family members continue to rely mostly on self-care, it was by collapsing prostitution into arguments about family and sexual trauma that important prostitution-abolitionist feminist court reformers successfully made demands on the state. In so doing, they described prostitution defendants as vulnerable ex-children—that is, as people who suffer from childhood sexual assault rather than as people who suffer from precarious labor-market conditions.

Or to put this observation another way, to create the New York City HTICs as social welfarist courts, prominent abolitionist feminist court reformers made arguments about the psychological effects of sexual, physical, and affective family violence and childhood trauma. In so doing, they made a particular kind of psychological disability (rather than market instability) a legal and policy justification for treatment and aid. As Adler explains, “the current standard [for trauma-informed counseling in the criminal justice system] is you focus on some kind of traumatic event or events and the sequelae in terms of the various symptoms which we can see codified in the DSM-V and other places.”<sup>370</sup> This is the clinical standard—

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370. Interview with Julian Adler, *supra* note 287. The Diagnostic and Statistical Manual of Mental Disorders (DSM)-V, published in 2013, reclassified PTSD from an anxiety disorder to a disorder under a new heading: “Trauma- and Stressor-Related Disorders.” See AM. PSYCHIATRIC ASS’N, POSTTRAUMATIC STRESS DISORDER (2013), <http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf> [<https://perma.cc/QPL3-RBY2>]. As Adler suggests, to define PTSD, the DSM-V details particular behavioral symptoms thought to follow from an event (either directly experienced, witnessed, or learned about) that involves “actual or threatened death, serious injury, or sexual violence.” The manual elaborates:

The directly experienced traumatic events . . . include, but are not limited to, exposure to war as a combatant or civilian, threatened or actual physical assault (e.g., physical



treating memories and behavioral reactions to a traumatic event—even if, as is surely sometimes the case, people arrested for selling sex experience only general and *uneventful* socioeconomic exploitation and constraint.

For this same reason, the New York City HTICs largely cut against efforts to legalize and regulate prostitution as a form of labor and work. But my argument here is different. Trauma discourse, I am suggesting, circulates as a reformist idea for welfare provision today because it is underspecified in social and political meaning. It allows left-progressive service providers to take a break from the demands of teaching individual responsibility to their clients and instead invites them to see aid recipients more sympathetically as victims of forces beyond their control—a perhaps especially welcome shift in a moment of intense global financial instability. At the same time, however, trauma discourse need not challenge welfare retrenchment and responsibilization models in any broad or systemic way. To the contrary, trauma can nest within these powerful contemporary discourses because it offers a reason to make an exception.

To be sure, and again because of its capacious social meaning, there are efforts to radicalize and expand trauma discourse from within. Kate Barrow, for example, wants trauma to inspire court reformers to think beyond individual perpetrators of violence: “We should problematize the idea of that one man who we are locking up. We often pretend that we have fixed the problem while ignoring the impact of less obvious forms of trauma, such as trying to choose between whether you eat or get your medical care covered. We can overlook these situations as legitimately traumatic because you didn’t have a pimp putting you out on the corner.”<sup>371</sup> Or as Anne Patterson, a social worker and advocate employed by a trauma-informed service provider that works closely with New York City HTICs, argues: “One of the greatest collateral consequences of the trauma-informed emphasis is that it is so about individual survival, surviving individual acts of violence that are perpetrated

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attack, robbery, mugging, childhood physical abuse), threatened or actual sexual violence (e.g., forced sexual penetration, alcohol/drug-facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters, and severe motor vehicle accidents. For children, sexually violent events may include developmentally inappropriate sexual experiences without physical violence or injury. . . . Witnessed events include, but are not limited to, observing threatened or serious injury, unnatural death, physical or sexual abuse of another person due to violent assault, domestic violence, accident, war or disaster . . . . Indirect exposure through learning about an event is limited to experiences affecting close relatives or friends and experiences that are violent or accidental . . . . The disorder may be especially severe or long-lasting when the stressor is interpersonal and intentional (e.g., torture, sexual violence).

AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, at 309.81(A) & cmt. (5th ed. 2013).

371. Interview with Kate Barrow, *supra* note 290.

against you rather than structural violence.”<sup>372</sup> Adler likewise suggests that “there’s a push by many [trauma practitioners and theorists] to think more broadly in terms of environmental or neighborhood or ecological factors. But I don’t think that’s the norm.”<sup>373</sup>

That is, these court reformers and trauma-trained clinicians suggest that a theory of trauma could enable advocates to describe numerous classes of people in the criminal justice system (and perhaps in the welfare system beyond) as simultaneously agents and victims: for example, people who make choices that are constrained by the overwhelming distress of living under unstable economic conditions and the absence of social provisions. But in the New York City HTICs, it would seem that trauma is understood mostly not in this way: in official court practice, judges and prosecutors recognize particular kinds of traumatic interpersonal and sexual violence but not traumatic economic and social state and non-state systems.

### Conclusion

In the early twenty-first century, as in the early twentieth century, urban criminal courts are engaged in explicit projects of social governance. Once again, certain practices defined as crimes are understood as effects of forces beyond individual control and, once again, court reformers debate what, if anything, in the mutually constitutive practices of punishment, welfare, and rehabilitation, this fact should mean. This Article has traced how social understandings of the relevant external factors thought to compel (or motivate) the selling of sex have changed over time. It has also traced how these changing understandings have inspired different attempts to deploy informal court procedure to intertwine social welfare with social control and individual responsibility. In the process, the Article has argued, informal low-level criminal courts have themselves influenced what categories of people constitute the deserving poor and via what practices and techniques such people are to be reformed and remade.

At the beginning of the twentieth century, court reformers in New York proposed to help reform the moral character and social behavior of

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372. Interview with Anne Patterson, Dir., STEPS to End Family Violence, in E. Harlem, N.Y. (Apr. 9, 2015) (on file with author).

373. Adler also points to a disconnect between the clinical skills and training of trauma practitioners and more systemic interventions: “Also, what do you do with [environmental or neighborhood or ecological factors]? How do you alleviate those symptoms?” Interview with Julian Adler, *supra* note 287. Patterson likewise argues:

To some extent [the individual emphasis] is practical; we feel like we have some influence on a single person’s trauma symptoms. There are a lot of interventions designed to alleviate individual trauma symptoms, but there are no interventions designed to effectively address the influence of sort of multi-generational structural trauma. You can sit down with someone and do a course of EMDR [Eye Movement Desensitization and Randomization] and that can create great relief.

Interview with Anne Patterson, *supra* note 372.

prostitution defendants via probation and public and private institutional reformatories—at least when defendants could be framed as market victims. At the end of the century, court reformers instead proposed to spend public and private resources to teach individual responsibility to prostitution defendants broadly understood as petty market participants. These two moments of welfarist court reform unfolded under dramatically different political and economic conditions. The first two decades of the twentieth century witnessed the rise of social law and policy in response to the limits of classical liberalism; the last two decades witnessed the rise of neoliberalism in response to the limits of the social welfare state.

Today, the New York City HTICs administer social services and counseling to prostitution defendants because they suffer from family, sexual, and childhood trauma. These courts thus ground new arguments for social welfare and social control on a distinctive theory of psychological disability—even as this theory sometimes penetrates legal institutions in ways that exceed (or purposefully disrespect) a clinical definition. Indeed, it is in part for this reason that court reformers and social workers can use the language of trauma in an effort to create new, more solidaristic relations from within criminal courts including via political-economic critiques of existing systems.

This story is still beginning.<sup>374</sup> Many questions remain. In a moment of increasing capitalist crisis, could calls for trauma-informed care in fact lend support to broader egalitarian struggles including by linking prostitution not to criminalization but to labor-market critique? In a moment of escalating crisis about “over-criminalization,” could a trauma-informed model spread beyond the HTICs to change the mix of social welfare, social control, and individual responsibility applied in other problem-solving courts, such as

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374. Of course, the uptake of PTSD in law is not new. Over twenty years ago, Alan Stone argued that “[n]o diagnosis in the history of American psychiatry has had a more dramatic and pervasive impact on law and social justice than post-traumatic stress disorder.” Alan A. Stone, *Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULL. AM. ACAD. PSYCHIATRY L. 23, 23 (1993). Stone proceeded to catalogue the numerous and complex ways that advocates have tried to use PTSD to establish insanity, diminished capacity, and self-defense in criminal law, especially for crimes committed by veterans and women victims (as well as to bolster the victims’ rights movement). *Id.* at 24–29. If the story of trauma is still unfolding, it is because the HTICs in part reflect a broader moral impulse to change how problem-solving courts produce knowledge about dependent subjects—beyond specific instances of doctrinal reform. As such, the HTICs potentially suggest that today PTSD is accomplishing different social and legal work. As Young argues, PTSD “is not timeless, nor does it possess an intrinsic unity. Rather, it is glued together by the practices, technologies, and narratives with which it is diagnosed, studied, treated, and represented and by the various interests, institutions, and moral arguments that mobilized these efforts and resources.” ALLAN YOUNG, *THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER* 5 (1995).

drug and veterans courts, and to criminal defendants more broadly?<sup>375</sup> Goodman, for example, argues that the current focus on prostitution and women “is an opportunity to expand the conversation and programming” including to “men of color who witness systemic violence in their neighborhoods and communities and then commit crimes.”<sup>376</sup> Will the uptake of trauma in the criminal justice system mean court reform for them?

To be sure, the New York City HTICs process a tiny fraction of the city’s misdemeanants, and they emerged in the shadow of a highly politicized (and gendered) international anti-trafficking campaign. These courts are thus highly specific. But perhaps they are not entirely exceptional, especially as they offer insight into how court actors today understand what counts as a pioneering practice and set of reforms.

Gar Alperovitz has described our present political moment as one of “prehistory.” In so doing, he analogizes to the many disaggregated local, municipal, and state experiments that characterized the Progressive era—disparate and decentralized undertakings that nonetheless paved the way for

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375. Trauma discourse is spreading to parallel court reform initiatives but in different ways with different justificatory rhetorics. For example, since 2008, specialized veterans courts have been opening throughout the country offering treatment mandates and lenient dispositions for a range of misdemeanor and felony charges for veterans understood as suffering from PTSD—indeed, it was war (specifically in Vietnam) that in 1980 propelled psychologists to recognize PTSD as a formal clinical diagnosis. See YOUNG, *supra* note 374, at 3–5. Here arguments about social responsibility stem from ideas about national service rather than interpersonal violence, although it would seem that trauma has done less in veteran than prostitution courts to disrupt a responsibilization model. See Robert T. Russell, *Veterans Treatment Courts*, 31 *TOURO L. REV.* 385, 388–90 (2015) (explaining that veterans courts are explicitly modeled after drug courts including progressively harsher sanctioning for infractions of service mandates); Kristine A. Huskey, *Reconceptualizing “the Crime” in Veterans Treatment Courts*, 27 *FED. SENT’G REP.* 178, 182 (2015) (describing connections between PTSD, traumatic brain injury, and criminal behavior, and criticizing veterans courts for nonetheless treating veterans like offenders in drug and mental health courts). For veterans, Huskey argues, “more responsibility for the underlying conditions [should] be shouldered by the community and the nation.” *Id.*

I should also add: A current controversy plaguing veterans’ courts is a clash of traumas. Domestic violence advocates have argued to exclude veterans who batter family members from specialized treatment courts. See, e.g., Pamela Kravetz, Note, *Way off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 *VETERANS L. REV.* 162, 166–67 (2012); Claudia Arno, Note, *Proportional Response: The Need for More—and More Standardized—Veterans’ Courts*, 48 *U. MICH. J.L. REFORM* 1039, 1063–64 (2015) (describing an attempt to persuade Nevada lawmakers to enact a blanket exclusion of veterans charged with domestic violence offenses from veterans courts). Others have argued for inclusion precisely because domestic violence can be an effect of PTSD. E.g., Linda J. Fresneda, *The Aftermath of International Conflicts: Veterans Domestic Violence Cases and Veterans Treatment Courts*, 37 *NOVA L. REV.* 631, 650–56 (2013). Judge Russell suggests that the Buffalo Veterans Court distinguishes between offenders who commit domestic violence when it is “related to their service,” including as an effect of PTSD and traumatic brain injury, versus “those with a predisposition for domestic violence” (though he does not explain how court personnel identify the difference). Russell, *supra*, at 395.

376. Interview with Miriam Goodman (June 2014), *supra* note 282.

a new discursive and material (and, of course, imperfect) state welfarist frame.<sup>377</sup> If the HTICs index anything about the present writ large, it is a renewed yearning for social responsibility and state protection, but one that is mediated, moderated, and made politically acceptable by the, as of yet, underdetermined language of trauma.

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377. Gar Alperovitz, *Inequality's Dead End—And the Possibility of a New, Long-Term Direction*, NONPROFIT Q. (Mar. 10, 2015), <https://nonprofitquarterly.org/2015/03/10/inequality-s-dead-end-and-the-possibility-of-a-new-long-term-direction/> [<https://perma.cc/2J3E-BYTV>].

